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NOTES AND COMMENTS

Admiralty: Jurisdiction over longshoremen and harbor workers.—Injured maritime workers have long been faced with the problem of closely analyzing the fact situation under which they were injured in order to determine what relief they may seek. The alternatives are (a) state compensation acts or the Federal Longshoremen's and Harbor Workers' Act,[1] if they qualify as longshoremen or harbor workers; and (b) the federal legislation covering seamen if they are sufficiently engaged in navigation to be classed as "members of the crew." The Longshoremen's Act is the exclusive remedy for those who come within its scope.[2] The Seamen's Act[3] provides that "any seaman" who shall suffer personal injury or death in the course of his employment shall have the benefit of the Federal Employer's Liability Act.[4]

As between the coverage of state compensation acts and the federal compensation act, a long line of United States Supreme Court decisions has developed the rule that an injury or death, even on navigable waters, may fall under the state compensation act if the matter is "maritime but local."[5] If the employee's work is "maritime" in character, the state act is excluded, but the question remains whether to class the maritime work under the Seamen's Act, which is not a compensation statute, or under the Longshoremen's and Harbor Workers' Act, which is. Section 3 of the Longshoremen's and Harbor Workers' Act provides for compensation in respect of the disability or death of an employee which occurs upon navigable waters of the United States and any dry docks if recovery for the disability or death may not validly be provided by state law and if the injured or deceased is not a master or member of a crew nor a person engaged to load or unload a vessel of under eighteen tons net.[6]

John Schumann was drowned while serving his employer, the Chicago Coal and Dock Company, in navigable waters of the United States on a vessel of 372 net tons used for fueling steamboats and other marine equip-

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[1] 44 STAT. 1424 (1927), 33 U. S. C. A. §§ 901 *et seq.* (Supp. 1939).
[2] 44 STAT. 1426 (1927), 33 U. S. C. A. § 905 (Supp. 1939).
[3] 41 STAT. 1007 (1920), 46 U. S. C. A. § 688 (1928).
[4] 35 STAT. 65 (1908), 45 U. S. C. A. § 51 (1928).
[5] Sultan Ry. v. Dept. of Labor & Industries of Washington, 277 U. S. 135, 48 Sup. Ct. 505 (1928); Alaska Packers Association v. Industrial Accident Commission of California, 276 U. S. 467, 48 Sup. Ct. 346 (1926); State Industrial Board of New York v. Terry & Tench Co., Inc., 273 U. S. 639, 47 Sup. Ct. 90 (1926); Millers Indemnity Underwriters v. Braud, 270 U. S. 59, 46 Sup. Ct. 194 (1926), noted (1926) 14 GEO. L. J. 185; Grant Smith-Porter Co. v. Rhode, 257 U. S. 469, 42 Sup. Ct. 157 (1921), noted (1922) 22 COL. L. REV. 368, (1922) 17 ILL. L. REV. 318, (1922) 20 MICH. L. REV. 535, (1922) 31 YALE L. J. 561. See ROBINSON, ADMIRALTY (1939) § 14, pp. 101-109.
[6] 44 STAT. 1426 (1927), 33 U. S. C. A. § 903 (Supp. 1939). Section 3 of the Longshoremen's and Harbor Workers' Compensation Act provides, "'Coverage'—Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability results from an injury occurring on the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. . . ."

ment. He had no living or dining quarters on the ship but was called daily as his services were desired. He had signed no seaman's "articles" nor were they necessary in this kind of work. His principal duty was to facilitate the flow of coal from his ship to the vessel being fueled; occasionally he cleared the boat and threw out the ship's rope in docking the vessel. For purposes of filling the ship's certified complement, he was considered both a "seaman" and a "member of the crew."[7] In *South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251, 60 Sup. Ct. 544 (1940)*, the United States Supreme Court held that an award under the Longshoremen's and Harbor Workers' Compensation Act[8] could not be upset by a District Court of the United States, as there was sufficient evidence to support the finding of the Deputy Commissioner that the decedent was not "a member of the crew" within the meaning of the Act.

The courts have adopted the same tests of coverage under the Longshoremen's and Harbor Workers' Act as are required for admiralty jurisdiction over torts.[9] The employee must sustain injury on navigable waters of the United States in the course of his employment.[10] His injuries, however, must occur under circumstances which preclude state compensation laws from providing for recovery.[11]

Although the general maritime law may to a certain degree be affected by state legislation, the United States Supreme Court has held that where the matter is such as to require uniformity throughout the states, a state compensation act cannot be applied to workers injured on navigable waters while engaged in work of a maritime nature,[12] and that an Act of Congress so providing is unconstitutional.[13] Thus a state compensation act could not cover a longshoreman injured on shipboard while unloading a vessel.[14] The

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[7]The deceased was classed as a deckhand. The Circuit Court of Appeals report of the case [104 F. (2d) 522, 524 (C. C. A. 7th 1939)] states that the ship's certificate of inspection required that "Included in the entire *crew* hereinafter specified and designated there must be 1 licensed master and pilot, 1 licensed chief engineer, 3 *seamen*, 1 fireman. If deceased were counted as a member of the crew, the full complement of the ship was present, otherwise not." (Italics supplied.) The deceased had no "articles" nor were they necessary in this kind of work.

[8]44 STAT. 1426 (1927), 33 U. S. C. A. § 903 (Supp. 1939).

[9]Minnie v. Port Huron Terminal Co., 295 U. S. 647, 55 Sup. Ct. 884 (1935), noted (1935) 3 U. OF CHI. L. REV. 321, (1935) 34 MICH. L. REV. 281; T. Smith & Son, Inc. v. Taylor, 276 U. S. 179, 48 Sup. Ct. 228 (1930). See ROBINSON, ADMIRALTY (1939) § 15, p. 120.

[10]New Amsterdam Casualty Co. v. McManigal, 87 F. (2d) 332 (C. C. A. 2d 1937).

[11]44 STAT. 1426 (1927), 33 U. S. C. A. § 903 (A) (Supp. 1939); New Amsterdam Casualty Co. v. McManigal, *supra* note 10.

[12]Nogueira v. N. Y., N. H. & H. R.R., 281 U. S. 128, 50 Sup. Ct. 303 (1929), noted (1929) 25 ILL. L. REV. 304; London v. Industrial Commission, 279 U. S. 109, 49 Sup. Ct. 296 (1929); Clyde Steamship Co. v. Walker, 244 U. S. 255, 37 Sup. Ct. 545 (1916), noted (1917) 85 CENT. L. J. 57; Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524 (1916), noted (1917) 3 CORNELL L. Q. 38, (1917) 6 CALIF. L. REV. 69, (1917) 17 COL. L. REV. 703, (1917) 27 YALE L. J. 132.

[13]Knickerbocker Ice Company v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438 (1920), noted (1920) 20 COL. L. REV. 685, (1920) 34 HARV. L. REV. 82, (1920) 18 MICH. L. REV. 793, (1920) 29 YALE L. J. 925.

[14]Southern Pacific Co. v. Jensen, *supra* note 12.

Supreme Court, however, has developed a companion rule that even if the injury occurs on navigable waters, recovery may be had in state courts under state compensation statutes if the nature of the employment is "local" in character and has only an incidental relation to navigation and commerce.[15] Thus the Supreme Court has sustained recovery under state compensation statutes where a diver submerged from a barge anchored thirty-five feet from the bank to remove an abandoned set of ways formerly used for the launching of ships,[16] and where a carpenter was injured while completing a bulkhead to enclose certain tanks on a substantially completed ship already launched.[17] These decisions, therefore, complete the formula for determining whether the state statute or the federal law applies.

If the harbor worker is engaged in duties actually affecting the navigation of the ship, he is a "member of the crew" and thus beyond the scope of the Longshoremen's and Harbor Workers' Compensation Act and within that of the Seamen's Act.[18] An employee within the "crew" class has the right of election offered seamen under the Seamen's Act[19] to maintain an action under general maritime law or to bring action under the Federal Employer's Liability Act.[20] The mere fact that the employee may make trips beyond the harbor, however, will not make him a member of the crew within the meaning of the Longshoremen's Act.[21]

If the longshoreman or harbor worker is injured on land, or on a dock other than a dry dock, his problem is simplified as he is then not subject to admiralty jurisdiction and his recovery, if any, is under state law.[22]

In the principal case, the precise question was whether or not there was sufficient evidence to support the Deputy Commissioner's finding that the decedent was not a "member of the crew" within the meaning of the Longshoremen's statute. The Circuit Court of Appeals considering it significant that Schumann was not required to do any work while the vessel was in motion, and that his only duty relating to navigation was the task of throwing the lines in making fast to dock; but it also stressed the facts that the decedent was paid an hourly wage, that he slept at home and boarded off

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[15]Sultan Ry. v. Dept. of Labor & Industries of Washington, Alaska Packers Association v. Industrial Accident Commission of California, State Industrial Board of New York v. Terry & Tench Co., Inc., Millers Indemnity Underwriters v. Braud, Grant Smith-Porter Co. v. Rhode, all *supra* note 3; ROBINSON, ADMIRALTY (1939) § 14, pp. 101-109.

[16]Millers Indemnity Underwriters v. Braud, *supra* note 3.

[17]Grant Smith-Porter Co. v. Rhode, *supra* note 3.

[18]The Longshoremen's and Harbor Workers' Compensation Act exempts "a master or member of the crew of any vessel . . ." from its operation. 44 STAT. 1426 (1927), 33 U. S. C. A. § 903 (Supp. 1939).

[19]41 STAT. 1007 (1920), 46 U. S. C. A. § 688 (1928); Diomede v. Lowe, 87 F. (2d) 296 (C. C. A. 2d 1937).

[20]35 STAT. 65 (1908), 45 U. S. C. A. §§ 51 *et seq.* (1928).

[21]Harper v. Parker, 9 F. Supp. 744 (D. Md. 1935); De Wald v. Baltimore & Ohio R.R., 71 F. (2d) 810 (C. C. A. 4th 1934), *cert. denied,* 293 U. S. 581, 55 Sup. Ct. 94 (1934).

[22]Minnie v. Port Huron Terminal Co., 295 U. S. 647, 55 Sup. Ct. 844 (1935); Nogueira v. N. Y., N. H. & H. Ry., 281 U. S. 128, 50 Sup. Ct. 303 (1930); Smith & Son v. Taylor, 276 U. S. 179, 48 Sup. Ct. 288 (1928); State Industrial Commission v. Nordenholt, 259 U. S. 263, 42 Sup. Ct. 473 (1922).

ship and that he was called daily as his services were desired.[23] In a case where the employee was a deckhand but may have had slightly more importance in the navigation of the ship, the Fifth Circuit Court of Appeals held him to be "a member of the crew" but stressed the fact that though not an articled seaman he was fed and quartered aboard the dredge.[24] The Fourth Circuit Court of Appeals held the sole person in charge of barges which were not operated under their own power to be neither a "master" nor "member of the crew" but again the court stressed the fact that the employee lived off ship.[25] Where, however, the deceased wheeled and shoveled coal, scrubbed decks, handled the lines in making landings and in passing through locks, a District Court recently held that he was not a member of the crew within the meaning of the Longshoremen's and Harbor Workers' Act even though he boarded and slept on board during trips.[26] Also, a District Court decision has recently held that a cook on a tugboat was within the coverage of the Act.[27]

The decision in the principal case seems just on its facts and indicates an unwillingness on the part of the courts to deprive a worker of the benefits of the Longshoremen's and Harbor Workers' Compensation Act unless he is clearly engaged in the navigation of the ship. Where the courts will draw the line is uncertain, but it now seems that to be a "member of the crew" the worker must be engaged in the navigation of the ship and not merely assist others who are engaged in navigation. This is true even though, for purposes other than compensation, the worker might be considered a seaman.

William G. DeLamater

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[23]South Chicago Coal & Dock Co. v. Bassett, 104 F. (2d) 522 (C. C. A. 7th 1939).

[24]In Maryland Casualty Co. v. Lawson, 94 F. (2d) 190 (C. C. A. 5th 1938), deceased was hired by the master of a dredge, was fed and quartered aboard her and daily worked eight hours on a scow affiliated with the dredge. On the scow he handled the lines, attended to dumping and cleaning the scow at sea, and did what was necessary to her navigation. He had no seaman's articles, however, and was not shown to be an experienced sailor. He was employed under the title "deckhand." The court held the employee to be a "member of the crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, stating that "Burrows, though not an articled seaman, was permanently attached to the dredge and her attendant scow as a member of the ship's company." 94 F. (2d) 190, 193 (C. C. A. 5th 1938).

[25]In DeWald v. Baltimore & Ohio R.R., 71 F. (2d) 810 (C. C. A. 4th 1934), the bargeman's duties were to check and supervise loading and unloading of cargo and to keep the records thereof. He was the sole worker on barges which were not navigated under their own power. He was held not to be a "master" or "member of the crew" so as to prevent recovery under the Longshoremen's and Harbor Workers' Compensation Act. The court ruled that such work as he did in making fast lines at dock or pumping water out of the barges was incidental to his main employment. It stressed the facts that DeWald did not live upon the barge but went home every night and that the barges were not navigated under their own power.

[26]Blaske v. Bassett, 1940 A. M. C. 1319 (D. Mo. 1940).

[27]Mechling Barge Line v. Bassett, 1940 A. M. C. 1323 (N. D. Ill. 1940).

Aviation: Limitation of passenger liability: Is airplane a "Vessel"?—*Dollins v. Pan-American Grace Airways, Inc., 27 F. Supp. 487, 1939 A. M. C. 691, 1939 U. S. Av. R. 6 (S. D. N. Y. 1939)*[1] and *Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412, 1939 A. M. C. 1048, 1939 U. S. Av. R. 1 (S. D. N. Y. 1939)*[2] involve deaths of passengers on seaplanes which crashed into the sea. In both cases the airlines sought limitations of liability under the admiralty rules[3] applied to owners of vessels. The court in both decided that a seaplane was not a "vessel" within the meaning of the statute[4] dealing with limitation of marine liability. The increase of air travel, national and international, coupled with recent fatalities,[5] makes the question of limitation of passenger liability pertinent. This topic will be discussed (1) under admiralty rules, (2) under the Warsaw Convention, and (3) under common law liability.

The attempt to seek advantage of the admiralty doctrines in the instant cases is understandable. For some purposes the seaplane is subject to admiralty law such as harbor traffic rules[6] and salvage.[7] The same reasons supporting limitation of marine passenger liability could be applied to air lines.[8] However, in the few cases[9] that sought an advantage in the mari-

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[1]Noted (1939) 10 AIR L. REV. 410.

[2]Noted (1940) 8 GEO. WASH. L. REV. 852.

[3]ROBINSON, ADMIRALTY (1939) §§ 117-124.

[4]REV. STAT. §§ 4283-4289 (1877), 46 U. S. C. A. § 183(a) (1936): "The liability of the owner of any vessel, whether American or Foreign, for any . . . loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture . . . occasioned . . . without privity or knowledge of such owners shall not . . . exceed the amount or value of the interest of such owner in such vessel and her freight then pending." Section 183(b): "In case of . . . seagoing vessel, if amount of owner's liability as limited under 183(a) is insufficient to pay all losses in full and the portion . . . applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 a ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts."

[5]Crash involving Senator Lundeen and 24 others, TIME MAGAZINE, Sept. 9, 1940, p. 17 and crash of United Air Line plane in Utah killing 10 people, N. Y. Times, Nov. 6, 1940, p. 17, col. 2.

[6]Commerce Act Regulations 60.64: Aircraft on water—Between sunset and sunrise all aircraft which are on the surface of water and not under way or which are moored or anchored in navigation lanes, shall show a white light visible for at least two miles in all directions. 60.68: Fog signals—In fog, mist or heavy weather an aircraft on the water in navigation lanes shall signal its presence by a sound device emitting a signal for about five seconds at one minute intervals. 60.91: Aircraft on water—Seaplanes on the water shall navigate according to the laws and regulations of the U. S. government in the navigation and operation of watercraft, except as otherwise provided in these regulations.

[7]ROBINSON, ADMIRALTY (1939) 715. The Habana Convention of 1928, to which the United States adheres, and the Paris Air Navigation Convention of 1919 both provide that in the absence of agreement to the contrary, salvage of aircraft at sea is to be governed by the principles of maritime law. For the latest development in this field see Knauth, *The Aviation Salvage at Sea Convention of 1938* (1939) 10 AIR L. REV. 146. See also Knauth, *Aviation and Admiralty* (1935) 6 AIR L. REV. 309, 310.

[8]ROBINSON, ADMIRALTY (1939) § 117. See also Rittenberg, *Limitation of Airline Passenger Liability* (1935) 6 J. AIR L. 365, 382, 383.

[9]United States v. Northwest Air Service, 80 F. (2d) 804 (C. C. A. 9th 1934) (mari-

time classification, courts have not tended to treat seaplanes as vessels.[10]

Besides possible procedural advantages,[11] there would always be a distinct financial advantage[12] to the airlines if admiralty rules on the limitation of liability were applied. If the recent amendments providing that tonnage sums for the victims of disasters on seagoing vessels do not apply to the airplane, the surrender value of a crashed seaplane would usually be nil because everything is lost. Even if the $60 a ton provision[13] were availed of there would be but a small fund because seaplanes have no substantial tonnage. This would be unfair to the passenger. He would pay too great a proportion of the cost of developing aviation if subjected to such a limitation. The court acted properly in the instant cases in denying limitation of passenger liability according to the admiralty rules.

There has been, however, considerable willingness to let the passenger take a share in the cost of aeronautical development. In international air travel, the leading nations have adopted the Warsaw Convention[14] which has a limitation of passenger liability of 125,000 francs.[15] A higher limitation may be contracted for but any lower would be void. A few English cases[16]

time lien denied because seaplane not vessel); Watson v. R.C.A. Victor Co. Inc., 50 Lloyds L. Rep. 77, 1935 U. S. Av. R. 147 (1934) (salvage claim denied because seaplane not vessel); Wendorf v. Mo. State Life Ins. Co., 318 Mo. 363, 1 S. W. (2d) 99 (1927) (seaplane held not vessel but aircraft thus freeing insurance company from liability); Foss v. Crawford Bros. No. 2, 215 Fed. 269 (W. D. Wash. 1914) (libel for plane repairs denied). *But see* People *ex rel.* Cushing v. Smith, 206 App. Div. 642, 198 N. Y. Supp. 940 (3d Dep't 1923) (hydroplane vessel as far as muffler requirement on lake concerned) and Reinhardt v. Newport Flying Service Corp., 232 N. Y. 115, 133 N. E. 371 (1921) (seaplane held vessel in denying state law compensation claim).

[10]See definition of vessel in REV. STAT. § 3 (1870), 1 U. S. C. A. § 3 (1926): "Every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water." This would seem broad enough to include a seaplane. Compare *supra* note 6 for times when seaplane is treated as vessel.

[11]Knauth, *Aviation and Admiralty* (1935) 6 AIR L. REV. 226, 230 (no jury, admiralty procedure).

[12]ROBINSON, ADMIRALTY (1939) 930 (value of vessel surrendered is value after disaster or end of the voyage).

[13]ROBINSON, ADMIRALTY (1939) § 123 (owner must supply additional funds up to $60 a ton of gross tonnage. Within limits of vessel's value, death and injury claims compete with other liens in usual order of priorities; but added funds are allotted solely to the death and personal injury claims). Compare the proposed Uniform Aviation Liability Act, (1938) 9 J. AIR L. 179, where maximum amount for one passenger is $10,000 and maximum amount for plane is graded according to horsepower with a top limit of $100,000 regardless of number of passengers.

[14]4 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 1113A. The following countries have adopted the Convention: Australia, Belgium, Brazil, Czechoslovakia, Danzig, France, Germany, Great Britain and British Colonies, Hungary, India, Irish Free State, Italy, Latvia, Lichtenstein, Mexico, The Netherlands, Poland, Roumania, Russia, Spain, Switzerland, United States, and Yugoslavia.

[15]This is of a standard fineness worth $8300. Since the Convention allows awards to be paid in national currencies, some difficulty may arise about foreign exchange and the time when it should be computed.

[16]Grein v. Imperial Airways, Ltd., (1937) 1 K. B. 50, 1936 U. S. Av. R. 184, noted (1937) 22 CORNELL L. Q. 561 (death case where Convention limit applied on round trip ticket); Phillippson v. Imperial Airways, Ltd., (1939) A. C. 332, 1939 U. S. Av. R. 63 (Convention's later adoption by Belgium held not to relate back to time of shipment of gold); Westminster Bank Ltd. v. Imperial Airways, Ltd., 1936 U. S. Av. R. 39

have arisen under this Convention.[17] Under such circumstances the airline operator can calculate his risk. Air traffic deaths are often spectacular with the consequent possibility of high jury verdicts. Since both the United States and Bermuda have adopted the Warsaw Convention, it covers the transit in the *Noakes* case and it is submitted that the limitation of that Convention would apply.

Limitation of passenger liability in domestic air travel is governed by the common law. The Civil Aeronautics Act makes no mention of limitation of passenger liability despite the adherence of the United States to the Warsaw Convention. With the background of railroad decisions,[18] courts have allowed no limitations for injuries or death. Many decided cases have given awards higher[19] than the Warsaw Convention or the proposed Uniform Aviation Liability Act.[20] On the practical side, proof or disproof of negligence is often impossible in air crashes because of the completeness of the wreck and the total loss of lives as in the *Dollins* case. Common law liability imposes a heavy burden on the airlines. A disastrous crash could disrupt the financial structure of an airline and at the same time those injured would run the risk of being inadequately compensated. A large jury verdict is of little value if the line cannot pay it; and insurance against this liability is made difficult because of the problematic amounts of verdicts.

All interests might be better served if some method of limitation of passenger liability similar to the Warsaw Convention or the proposed Uniform Aviation Liability Act were adopted as part of the Civil Aeronautics Act to handle the problem in domestic air transportation. With such a limitation, insurance actuaries could figure coverage accurately and the airlines should then be required to carry insurance or reserves at all times equal to the maximum liability.

John M. Keane

(consignment note did not conform properly and no limitation allowed on shipment of gold).

[17]The Convention does not apply if one of the termini is located in the country of a non-participating party. For a discussion see Sullivan, *The Codification of Air Carrier Liability by International Convention* (1936) 7 J. AIR L. 1, 8-13.

[18]See Rittenberg, *Limitation of Airline Passenger Liability* (1935) 6 J. AIR L. 362 (treats railroad background); Knauth, *Compulsory Aviation Liability Insurance in Great Britain and the United States* (1937) 8 J. AIR L. 461, 466.

[19]Conklin v. Canadian Colonial Airways, 266 N. Y. 244, 194 N. E. 692 (1935) ($75,274 reduced to $25,000); Curtiss-Wright Flying Service v. Glose, 66 F. (2d) 710 (C. C. A. 3d 1933) ($56,000 reduced to $40,000); McCusker v. Curtiss-Wright Flying Service, 269 Ill. App. 502, (1933) ($10,000 affirmed); Curtiss-Wright Flying Service v. Williamson, 51 S. W. (2d) 1047 (Tex. Civ. App. 1932) ($25,000 affirmed); Ziser v. Colonial Western Airways, 10 N. J. Misc. 1118, 162 Atl. 591 (Sup. Ct. 1932) ($46,000 reduced to $25,000); Boele v. Colonial Western Airways, 10 N. J. Misc. 217, 158 Atl. 214 (Sup. Ct. 1932) ($38,000 reduced to $25,000); Henderson v. Colonial Western Airways, 10 N. J. Misc. 217, 158 Atl. 440 (Sup. Ct. 1932) ($33,900 reduced to $15,000).

[20](1938) 9 J. AIR L. 179 (text of proposed Uniform Aviation Liability Act. Approach is that of workmen's compensation statutes with list of awards for varying injuries regardless of negligence).

Constitutional Law: Compulsory flag salute: Interference with religious freedom.— The present war has brought to the United States a feeling of insecurity and an emphasis upon national defense. It has brought also an attitude of suspicion toward non-conformists within our ranks. And, as we begin to divide the population into those who are with us and those who are against us, there has come the danger that patriotism will degenerate into a popular fetish.[1] This danger the recent decision of the United States Supreme Court in *Minersville School District v. Gobitis, 310 U. S. 586, 60 Sup. Ct. 1010 (1940),* does not mitigate.

In accordance with a rule of a local school board having the force of state law, two children, one twelve and the other ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to saluate the flag as a part of a daily school exercise. In thus refusing they were following the injunctions of their parents who were members of a religious group which believes that such a form of respect is akin to idolatry and contrary to the commands of the Bible.[2] At the father's suit, the District Court[3] enjoined the school authorities from continuing to require participation in the ceremony as a condition of his children's attendance at the school on the ground that the rule in question impaired the religious freedom guaranteed by the Fourteenth Amendment. But the United States Supreme Court reversed a decision of the Circuit Court of Appeals[4] sustaining this injunction. The highest court, speaking through Mr. Justice Frankfurter, decided that the object of national unity justified the requirement. The justices relied upon the legislature's finding that the method chosen was appropriate to that end. Mr. Justice Stone dissented.

Although the First Amendment[5] is a limitation upon the national government only and not upon the states,[6] in the late case of *Cantwell v. Connecticut*[7] the Supreme Court held squarely that religious freedom is one of the liberties protected by the Fourteenth Amendment. This decision was foreshadowed by repeated dicta to that effect.[8] The constitution of every

[1] CONSOLATION, an organ of Jehovah's Witnesses, in the issue of May 29, 1940, contains an impressive list of indignities suffered by members of the sect because of their religious beliefs.

[2] This belief is the result of a literal interpretation of Exodus 20: 4, 5.

It is interesting to note that, while demanding tolerance for themselves, the members of the sect to which the plaintiff belonged (Jehovah's Witnesses) do not seem to be ready to tolerate the religious convictions of others. See High, *Armageddon Inc.* in SATURDAY EVENING POST, Sept. 14, 1940, p. 18.

[3] 24 F. Supp. 271 (E. D. Pa. 1938).

[4] 108 F. (2d) 683 (C. C. A. 3d 1939).

[5] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[6] Permali v. New Orleans, 3 How. 609, 11 L. ed. 739 (U. S. 1845).

[7] 310 U. S. 296, 60 Sup. Ct. 900 (1940).

[8] Hamilton v. University of California, 293 U. S. 245, 55 Sup. Ct. 197 (1934); Meyer v. Nebraska, 262 U. S. 390, 392, 43 Sup. Ct. 625 (1923).

The privileges and immunities clause of the 14th Amendment, however, will not protect the individual in his religious beliefs, as the Slaughterhouse Cases, 16 Wall. 36, 21 L. ed. 394 (U. S. 1873), early limited the privileges of citizens of the United States to those which spring from the character of the United States as a national government. For a time, following Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252 (1935),

state has a similar guaranty.[9] The liberty thus guaranteed is not, however, absolute, so that the problem has been one of defining limits. This problem has been rendered acute by numerous state flag laws and rules of local school boards having the force of state law.[10] Although there have been several decisions in the state courts sustaining these statutes, and appeals from three of these decisions were dismissed as involving no substantial federal question,[11] the *Gobitis* case is the first case sustaining such a statute in which an opinion has been written by the Supreme Court.

In dealing with these flag cases, the courts may employ one or more lines of reasoning in order to reach the conclusion that the statutes are constitutional. Thus, the tribunal may say that the particular belief or practice is so foreign to the culture of the American people that it cannot be called "religious."[12] Proponents of this approach point to the language of Mr. Justice Field in the nineteenth century case of *Davis v. Beason*,[13] where, in speaking of bigamy and polygamy, he stated, "To call their advocacy a tenet of religion is to offend the common sense of mankind."[14] Under this method of solution the standard set up ought to be based on the existing mores and not on the personal opinions of the judge.[15]

Another method used by the courts is to adopt a subjective test and recognize the right of the individual to make his own decision, but sustain the statute on the basis of the orthodox doctrine that the police power of the sovereign state supersedes personal liberties where the public interest requires it.[16] This fundamental doctrine was invoked in the *Gobitis* case. The problem is one of balancing the conflicting interests of the state and of the individual, and the courts have frequently inquired into the reasonableness of the solution reached by the legislature. Thus, in considering other cases where the contention has been advanced that a statute impairs free-

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it was thought that a broader interpretation would be given to the clause, but the recent decision in Madden v. Kentucky, 309 U. S. 83, 60 Sup. Ct. 406 (1940) reverses the *Colgate* case. *But cf.*, Hague v. C. I. O., 307 U. S. 496, 59 Sup. Ct. 954 (1939).

[9]*E.g.*, N. Y. CONST. (1938) Art. 1, § 3.

[10]See THE GAG ON TEACHING (2d rev. ed. 1937).

[11]Gabrielli v. Knickerbocker, 12 Cal. (2d) 85, 82 P. (2d) 391 (1938), *appeal dismissed*, 305 U. S. 267, 59 Sup. Ct. 786 (1939); Leoles v. Landers, 184 Ga. 580, 192 S. E. 278 (1937), *appeal dismissed*, 302 U. S. 656, 58 Sup. Ct. 364 (1937); Hering v. State Bd. of Ed., 117 N. J. L. 455, 189 Atl. 629 (Sup. Ct. 1937), *aff'd*, 118 N. J. L. 566, 194 Atl. 177 (1937), *appeal dismissed*, 303 U. S. 624, 58 Sup. Ct. 752 (1937).

[12]Leoles v. Landers, 184 Ga. 580, 192 S. E. 218 (1937), *appeal dismissed*, 302 U. S. 656, 58 Sup. Ct. 364 (1937); Nicholls v. Mayor, 297 Mass. 565, 7 N. E. (2d) 577 (1937); Hering v. State Bd. of Ed., 117 N. J. L. 455, 189 Atl. 629 (Sup. Ct. 1937), *aff'd*, 118 N. J. L. 566, 194 Atl. 177 (1937), *appeal dismissed*, 303 U. S. 624, 58 Sup. Ct. 752 (1937); People *ex rel.* Fish v. Sandstrom, 279 N. Y. 523, 28 N. E. (2d) 840 (1939).

[13]133 U. S. 333, 10 Sup. Ct. 299 (1890).

[14]*Id.* at 341.

[15]Aside from any standard, the court is free to inquire into the *bona fides* of the beliefs. North v. Board of Trustees, 137 Ill. 296, 27 N. E. 54 (1891); Coale v. Pearson, 165 Md. 224, 167 Atl. 54 (1933), *appeal dismissed*, 290 U. S. 597, 54 Sup. Ct. 131 (1933).

[16]Miller v. Schoene, 276 U. S. 272, 48 Sup. Ct. 246 (1928); Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625 (1924); *cf.* Lowell v. City of Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938).

dom of conscience, the courts have held that the necessity for peace, safety, and good order in the community was sufficient to justify a restriction on religious freedom where the right claimed was the unlicensed practice of medicine,[17] a refusal to be vaccinated,[18] doing business on Sunday,[19] shouting,[20] and the use of sacramental wine.[21] In the principal case, the Court says the object of national solidarity is a justifiable end. Nor is a statute designed to promote this end new, for it has had its forerunner in legislation outlawing the teaching of foreign languages to young children. Those acts were held to be unconstitutional, the courts declaring that there was no emergency present sufficient to render knowledge by a child of some language other than English so *clearly* harmful as to justify the infringement of fundamental liberties.[22] Assuming that such an emergency exists today, is a rule requiring a child to commit what he considers to be a sin an effective method of teaching a love of country?

Still another method of reasoning has been to say that the state has not infringed any liberties because the child is not forced to attend public school; if the burden upon the individual is great, he can go to a private school.[23] A patent objection to this argument is that attendance at *some* school is required, and frequently the parent cannot support his child at a private school. In such a situation, it seems mere verbiage to speak of a "choice." There are certain instances, however, where the idea of a choice is relevant. Thus, in *Hamilton v. University of California,*[24] the state required students at the University of California to study military science and tactics. When the plaintiff objected and sued for a writ compelling the Regents to admit him into the University without taking the course, the Supreme Court pointed out to him that no one was compelling him to go to the University of California, and that there were other colleges within the state where such instruction was not required. It is pertinent to note, moreover, that training in the uses of weapons of defense seems to bear a closer relationship to the welfare of the public than a requirement that school children go through the formal gestures of saluting the flag.

The idea of a choice has also weighed heavily with the court in considering state laws requiring the reading of the Bible in public schools.[25] Generally, under these laws, the teacher is instructed to make no comments. In such

[17]State v. Verbon, 167 Wash. 140, 8 P. (2d) 1083 (1932).

[18]Vonegut v. Baun, 206 Ind. 172 (1934).

[19]Elliot v. State, 29 Ariz. 389, 242 Pac. 340 (1926).

[20]City of Louisiana v. Bottoms, 300 S. W. 316 (Mo. 1927).

[21]Shapiro v. Lyle, 30 F. (2d) 971 (W. D. Wash. 1929), *appeal dismissed,* 36 F. (2d) 1021 (C. C. A. 7th 1930).

[22]Bartels v. Iowa, 262 U. S. 404, 43 Sup. Ct. 628 (1923); Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. 625 (1923).

[23]Leoles v. Landers, 184 Ga. 580, 192 S. E. 218 (1938), *appeal dismissed,* 302 U. S. 656, 58 Sup. Ct. 364 (1937); Hering v. State Bd. of Ed., 117 N. J. L. 455, 189 Atl. 629 (Sup. Ct. 1937), *aff'd,* 118 N. J. L. 566, 194 Atl. 177 (1937), *appeal dismissed,* 303 U. S. 624, 58 Sup. Ct. 752 (1937).

[24]293 U. S. 245, 54 Sup. Ct. 197 (1934).

[25]"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each and every public school, upon each and every school day, by the teacher in charge. . . ." PA. STAT. ANN. (Purdon, 1930) tit. 24, § 1555.

a situation, the validity of the statute may depend upon whether the pupil has the option of leaving the room while the reading is in progress, for the legislation is generally upheld if such an option is present.[26] Where there is no choice, the courts are more loath to sanction the requirement.[27]

Louis Levene

Contracts: Wills: Contract benefiting third persons as testamentary disposition.— A mortgagee, in entering into an agreement of extension of mortgage from Dec. 18, 1934, to March 7, 1940, provided that in event of her death prior to the latter date the interest and principal, as due, were to be paid one-half to her brother and one-half to heirs of a deceased sister. The mortgagee died shortly thereafter without having notified the donees of the agreement in their favor. On the next interest date, the plaintiffs, a brother, nieces and nephews of the deceased, claimed the payment by virtue of the extension agreement. The deceased mortgagee's administrator made a similar claim. In doubt as to whom he should pay, the mortgagor refused to pay any claimants and, on being sued by said relatives, impleaded the administrator. Refusing to interpret this as a third party beneficiary contract, the court held the extension agreement testamentary in nature and invalid because of non-compliance with the Statute of Wills.[1] *McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. (2d) 102 (1939).*[2]

As held by the court, it is clear that the plaintiffs' claim was insupportable upon the theory of an *inter vivos* gift. It is universally stated that "If the gift does not take effect as an executed and completed transfer to the donee, either legally or equitably, during the life of the donor, it is a testamentary disposition, good only when made by a valid will."[3] The donor's continued power of control or revocation, seized upon by the court here as the basis of its decision, is fatal to the theory of an accomplished *inter vivos* gift.[4] The law of trusts would seem to be to the same effect in an analogous situ-

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[26]People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S. E. 895 (1921). *See* Kaplan v. School Dist., 171 Minn. 142, 214 N. W. 18 (1927).

[27]Case upholding the practice: Donohue v. Richards, 38 Me. 379 (1854). *Contra:* People v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910); Herold v. Board of School Directors, 136 La. 1034, 68 So. 116 (1915); Nessle v. Hum, 2 Ohio Dec. 60 (1894); State v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902).

[1]N. Y. Cons. Laws, c. 13 (DECEDENT ESTATE LAW) § 21.

[2]From the majority opinion, written by Chief Judge Crane, Judges Lehman and Loughran dissented without opinion.

[3]28 C. J. 624, quoted by the court. 281 N. Y. at 409. The statement is also borne out by the following recent cases: Leonard v. Campbell, 189 So. 839 (Fla. 1939); Cutts v. Najdrowski, 121 N. J. Eq. 546, 191 Atl. 867 (1937); *In re* Fitzpatrick's Estate, 17 N. Y. S. (2d) 280 (Surr. Ct. 1940). *But cf.* Montgomery v. Reeves, 167 Ga. 623, 146 S. E. 311 (1929).

[4]"This is the ever recurring case of an attempt at once to give property and keep it, and as long as men keep trying to do that lawyers will not starve." Denison, C. J., in Griffith v. Sands, 84 Colo. 456, 457, 271 Pac. 191 (1928).

ation. Although the power to revoke a trust coupled with a reservation of a life interest in the settlor does not, in and of itself, make the trust testamentary,[5] the addition of general control normally results in a testamentary disposition.[6]

The analogy of a life insurance policy which reserves to the insured the power to change the beneficiary would be troublesome were it not for the fact that insurance law is recognized to be *sui generis*.[7] The whole beneficial enjoyment of the gift is necessarily postponed until the death of the donor; and the validity of the donative transfer is not affected by the power explicitly reserved[8] to surrender the policy or change the beneficiary. The courts have refused to apply a doctrine similar to that of the insurance cases to property dispositions other than tentative trusts of savings bank deposits.[9]

The court brusquely dismissed the contention of the applicability of *Seaver v. Ransom*,[10] the case generally deemed to have opened the way for introduction of the donee beneficiary doctrine into the law of New York. However, it seems that the court well might have applied the third party beneficiary theory in the instant case, holding that the plaintiffs, as donee beneficiaries, acquired a vested[11] though defeasible contractual right immediately upon the signing of the agreement.[12] No right to revoke or alter

[5]Adams v. Hagerot, 34 F. (2d) 899 (C. C. A. 8th 1929); Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139, 73 A. L. R. 201, 209 (1929); Bear v. Milliken Trust Co., 336 Ill. 366, 168 N. E. 349 (1929); Mersereau v. Bennet, 124 App. Div. 413, 108 N. Y. Supp. 868 (1st Dep't 1908); Cleveland Trust Co. v. White, 58 Ohio App. 339, 16 N. E. (2d) 588 (1938); 4 BOGERT, TRUSTS AND TRUSTEES (1935) § 994.

[6]Russell v. Webster, 213 Mass. 491, 100 N. E. 637 (1913); Tunnell's Estate, 325 Pa. 554, 190 Atl. 906 (1937); Darling v. Mattoon State Bank, 189 Wis. 117, 207 N. W. 254 (1926); *cf.* Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966, 112 A. L. R. 643, 649 (1937). There is, however, considerable authority to the effect that the reservation of a certain amount of control by the settlor does not make the trust testamentary. Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Davis v. Rossi, 326 Mo. 911, 34 S. W. (2d) 81 (1930); 1 SCOTT, TRUSTS (1939) § 57.2. An exception to the general principal exists in the realm of tentative trusts of savings bank deposits. Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904); Scanlon's Estate, 133 Pa. Super. Ct. 339, 2 A. (2d) 567 (1938).

[7]"[T]he insurance cases form a class by themselves, and but little reference is made in them to the general law of contracts." 2 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 369, p. 1079.

[8]By the great weight of authority, a life insurance beneficiary's right is indefeasible unless the reservation of the power to change the beneficiary is expressly included in the policy. Goldman v. Moses, 287 Mass. 393, 191 N. E. 873 (1934); Davis v. Modern Industrial Bank, 279 N. Y. 405, 18 N. E. (2d) 639 (1939), noted (1939) 24 CORNELL L. Q. 608; VANCE, INSURANCE (2d ed. 1930) § 147; 2 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 396.

[9]See *supra* note 6. "[The tentative] trust in substance appears to be testamentary. It is clear that a similar trust of property other than savings bank deposits would be invalid." 1 SCOTT, TRUSTS (1939) § 58.3, p. 360.

[10]224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187, 1193 (1918).

[11]The right vests without assent subject to the possibility of rejection. Rogers v. Gosnell, 58 Mo. 589 (1875); 2 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 349; RESTATEMENT, CONTRACTS (1932) § 137.

[12]RESTATEMENT, CONTRACTS (1932) § 142, and WHITESIDE, NEW YORK ANNOTATIONS (1933) at § 142. *Cf.* cases *supra* note 8.

the original contract was expressly reserved, though that agreement was itself subject to certain conditions, *i.e.*, the mortgagee's death[13] prior to March 7, 1940, with the debt unpaid.[14]

Although the court's cavalier treatment of *Seaver v. Ransom*[15] appears at first blush to suggest a limitation on the development of the donee beneficiary doctrine in New York by refusing to apply it to this type of case, actually the court by dictum reaffirmed the doctrine and adopted the Restatement view that the duty of the promisor to a donee beneficiary cannot be released or discharged by the promisee.[16] Upon the facts of the instant case, the court merely declined to hold that any rights whatever were intended to or did vest in the plaintiffs. The court's added dictum that all three parties must be alive[17] tends to mislead if understood to mean that all parties must be alive at the time of making of the contract, since it is well recognized that the donee beneficiary may be unidentified at the time the contract is made.[18]

Had the draftsman of the extension agreement made it in terms irrevocable, a contrary result would have been reached.[19] Similarly, validity through compliance with the Statute of Wills could have been obtained by adding to the agreement the phrase "as provided in my last will and testament" and to the will a corresponding provision.[20]

The decision in the instant case may be supported in view of the practical considerations involved. First, there is a strong public interest, jealously guarded by the courts, in mobilizing property for taxing purposes under the Statute of Wills of a given jurisdiction. The amount here involved was small;[21] but allowed in this case, the method might open the way to a mode of evasion in similar situations involving much larger amounts. More important is the havoc that a contrary holding might wreak in the real estate

[13]An agreement is not testamentary merely because death of one of the parties is a condition precedent to its enforcement. Univ. of S. Calif. v. Bryson, 103 Cal. App. 39, 283 Pac. 949 (1930); Miller v. McClune, 88 Pa. Super. Ct. 128 (1926); Gostina v. Whitham, 148 Wash. 72, 268 Pac. 132 (1928); Sheldon v. Blackman, 188 Wis. 4, 205 N. W. 486 (1925).

[14]The validity of the beneficiary's right is predicated upon the validity of the contract from which it is derived. Alexander v. Equitable Life Assur. Soc., 233 N. Y. 300, 135 N. E. 509 (1922); RESTATEMENT, CONTRACTS (1932) § 140.

[15]The two cases upon which the court principally relied [Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731 (1894); Priester v. Hohloch, 70 App. Div. 256, 75 N. Y. Supp. 405 (3d Dep't 1902)] were decided when New York did not recognize the donee beneficiary of a third party contract. However, on the authority of Seaver v. Ransom, *supra* note 10, the two earlier cases well might have gone the other way.

[16]281 N. Y. at 410. RESTATEMENT, CONTRACTS (1932) § 142.

[17]281 N. Y. at 410.

[18]RESTATEMENT, CONTRACTS (1932) § 139. In speaking of donee beneficiary contracts as "executed contracts" [281 N. Y. at 410], the court not only uses confusing terminology but also seems guilty of begging the question.

[19]281 N. Y. at 410.

[20]*A* conveyed land to *B* subject to payment by *B* to *C* of $1500 within one year after *A*'s decease, "as provided in my [*A*'s] last will and testament." Later, *A* gave *B* another deed, purporting to extinguish the encumbrance; but *A* reaffirmed her original intention in her will. *Held,* C's rights are indefeasible and were not affected by the subsequent deed. Logan v. Glass, 136 Pa. Super. Ct. 220, 7 Atl. 116 (1939).

[21]The principal indebtedness was $3000.

field. The mortgagor who—perhaps unaware of possible complications—promises to pay collateral heirs if the promisee dies might well encounter perplexing problems in attempting to locate such heirs, for heirs, like hares, have a way of multiplying and scattering in a most confusing manner. Difficulty in locating all proper payees would act as a drag on land transactions because of the delay involved, while complete inability to locate them would render the property less salable due to the resultant cloud on title. Similar considerations apply to foreclosure actions and the procedural difficulties attached thereto. Recognition, both explicit and implicit, of these factors moved the court to insist upon adherence to the legislative requirements for transmission by testamentary device. Therefore, it may be well that the court did not extend the third party beneficiary doctrine to this precise situation. The way, however, seems still open for its application to similar situations in which the practical considerations do not weigh so heavily.

John Wesley Reed

Damages: Damages in tort for deceit.—The efforts of the courts to formulate a rule of damages in fraud and deceit capable of precise application has led to a diversity of opinion. This diversity has spread to an equal degree among text writers and professors so that nothing is settled as the just law.[1] This paper will limit itself to a discussion of the diversity of opinion as to what is the proper measure of damages in tort actions wherein fraud has induced the sale of real property.

The recent case of *Selman* et ux. *v. Shirley* et al., *161 Ore. 613, 91 P. (2d) 312 (1939),* is a good example to use in such a discussion. There the plaintiff entered into a written contract to purchase, for $2000, a 160-acre ranch from the defendant. A substantial down payment was made, but after plaintiff failed to continue payment, defendant sought to eject him. Plaintiff, to prevent this, sued defendant for damages for fraud and deceit. He claimed that he was induced to buy because of certain false representations, among which was the defendant's representation that the stumpage on the land amounted to at least 4000 cords of wood whereas the total was actually only 200 cords.[2] The trial court found that the fair market value of the land actually was equal to the purchase price and concluded that the plaintiff had suffered no damage. The Supreme Court of Oregon,[3] however, awarded the plaintiff damages to the extent of the value of 3800 cords.[4] The original sale price was $2000, of which $750 had been paid down. Since the plaintiff was allowed $.50 per cord for the difference between the repre-

[1]This point is very well put in the opening paragraph of Hannegan, *The Measure of Damages in Tort for Deceit* (1938) 18 B. U. L. REV. 681.

[2]It is interesting to note that the facts show that plaintiff inspected the premises during a heavy rain and had no knowledge or experience in judging timber or lands.

[3]A prior appeal on this case is 161 Ore. 582, 85 P. (2d) 384 (1938), wherein the court held as the majority did in this case at bar.

[4]There was also an adjustment for the amount due the defendant on the purchase of the land.

sented 4000 cords and the actual 200, which sum amounted to $1900, the court's decree enabled plaintiff to acquire the 160 acres for $100. This is an application of what is commonly called the "loss-of-bargain" rule. However, the dissent in a very forceful argument applied the "out-of-pocket" rule and thus would have denied plaintiff any recovery.

The "out-of-pocket" rule is supported by the Supreme Court of the United States,[5] the courts of England[6] and a few American states,[7] and the Restatement of Torts.[8] The "loss-of-bargain" view is supported by the courts of the great majority of our states.[9] Under the "out-of-pocket" rule the measure of damages is the actual loss sustained as a legal result of the fraud which in the case of the purchase of property will ordinarily be the difference between the price paid by the plaintiff and the actual value of the property.[10] The supporters of this view claim that the plaintiff's recovery should, in all equity, be based on what he lost by reason of the falsity. They say that the function of tort damages is to make up for the loss of something, which plaintiff did have and has lost, by giving him back the amount he paid less the value of what he received. This view gives smaller verdicts as it gives to the defrauded party only the amount which he is out of pocket. It is easy of applieation as it sets up a simple, definite standard.

The majority "loss-of-bargain" rule measures the damages of the de-

[5]Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34 (1900); Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39 (1889); Chandler v. Andrews, 192 Fed. 543, 113 C. C. A. 15 (C. C. A. 2d 1911); *see* Towle v. Maxwell Motor Sales Corp., 26 F. (2d) 209, 212 (C. C. A. 8th 1928).

[6]Peek v. Derry, L. R. Ch. Div. 541 (1887).

[7]Ark., Minn., N. Y., Ore., Pa.; see note (1938) 57 A. L. R. 1147 for a complete state by state discussion.

The Court of Appeals of New York, in Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919) repudiated the view of "loss-of-benefit" and declared for the "out-of-pocket" view. It is said that *Reno v. Bull* has been qualified by Hotaling v. A. B. Leach & Co., 247 N. Y. 84, 159 N. E. 870 (1928). McCormick, Damages (1935) 450, n. 14, states this latter case indicates a willingness in New York to relax the strictness of the "actual loss" measure of damages in cases where it appears inadequate to accomplish justice.

[8]Restatement, Torts (1938) §§ 549, 525.

[9]Phillips v. Malone, 223 Ala. 381, 136 So. 793 (1931); Porter v. Hilton, 214 Cal. 705, 7 P. (2d) 301 (1931); Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887); Brunswick v. Demond, 35 Ga. App. 668, 134 S. E. 350 (1927); Hicks v. Dumes, 187 Ill. 164, 58 N. E. 252 (1900); Williamson v. Woten, 132 Ind. 202, 31 N. E. 791 (1892); Perry Co. v. Gould, 214 Iowa 893, 241 N. W. 666 (1932); Sheffer v. Rudnick, 291 Mass. 205, 196 N. E. 864 (1935); Hafner v. Stuart Land Co., 246 Mich. 465, 224 N. W. 630 (1929); Walfersberger v. Miller, 327 Mo. 1150, 39 S. W. (2d) 758 (1931); Long v. Freeman, 228 Mo. App. 1002, 69 S. W. (2d) 973 (1934); Beasley v. Swenton, 46 S. C. 426, 24 S. E. 313 (1896); Kerr v. Stauffer, 59 S. D. 83, 238 N. W. 156 (1931); McDonald v. McNull, 92 Vt. 356, 104 Atl. 337 (1918); Stout v. Marten, 87 W. Va. 1, 104 S. E. 157 (1920).

[10]Roosevelt v. Mo. Ins. Co., 78 F. (2d) 752 (C. C. A. 8th 1935); McDonough v. Williams, 77 Ark. 261, 92 S. W. 783 (1905); Keeney v. Angell, 92 Colo. 203, 19 P. (2d) 215 (1935); Cramer v. Overfield, 115 Kan. 586, 223 Pac. 1100 (1924); McGuffen v. Smith, 215 Ky. 606, 289 S. W. 884 (1926); Heidigger v. Burg, 137 Minn. 53, 162 N. W. 889 (1917); Mitchell v. Bassett, 99 N. J. L. 110, 123 Atl. 761 (1924); Graetz v. Smith, 125 Misc. 836, 211 N. Y. Supp. 577 (Sup. Ct. 1924); Zobrist v. Estes, 65 Ore. 573, 133 Pac. 644 (1912); Curtis v. Buzard, 254 Pa. 61, 98 Atl. 777 (1916); Bohlen, Cases on Torts (3d ed. 1926) 751; Harper, Torts (1933) 496; McCormick, Damages (1935) 448 *et seq.*

frauded vendee as the difference between the actual value of the property purchased and the value which it would have had if the representation had been true.[11] Some authorities favor this view because, they say, in an action of tort for a false warranty the plaintiff recovers the warranted value; a defendant in deceit is not merely a fraudulent person, he is also a warrantor of the truth of his statements, so the additional element of deceit cannot deprive the injured person of the rights which would be his if this element were lacking.[12] The supporters of this view also say that the "out-of-pocket" rule is favorable to the fraudulent person because he cannot lose anything by his fraud, while he stands a chance of making a profit if he is not caught. The majority rule protects the plaintiff against loss caused by the deceit and protects his interests in making an advantageous bargain.[13]

In few states have the courts applied any one of the theories with entire consistency. The courts will more often make the damages dependent upon the character of the misrepresentation rather than upon either theory.[14] So where the misrepresentations were made as to the existence of improvements on a parcel of land, recovery was limited to the cost of putting the improvements on the land.[15] Where the price paid was made up of a specific rate per unit of land, or where the price was paid for the whole tract, but the various units were of equal value, the damages have been measured by multiplying the rate paid or value per unit by the number of units by which the tract of land was deficient.[16]

One court, where there was considerable difference between the actual value and the represented value, placed the damages "as the difference between the purchase price and a sum of money which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented."[17] Another court, while committed to the majority view, rejected it in favor of the "out-of-pocket" view where the damages as measured by the latter were more just in the particular case.[18]

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[11] *Supra* note 9.

[12] 5 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1937) §§ 1391 *et seq.*

[13] Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011 (1907); Chapman v. Bible, 171 Mich. 663, 137 N. W. 533 (1912); Johnson v. Meyers, 91 Ore. 179, 177 Pac. 631 (1919); Webb v. Emerson-Brantenghen Co., 227 S. W. 499 (Tex. Civ. App. 1921). Also see *supra* note 9.

[14] McCORMICK, DAMAGES (1935) 452.

[15] Dinwiddie v. Stone, 21 Ky. L. Rep. 584, 52 S. W. 814 (1899); Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472 (1917).

[16] Tyler v. Anderson, 106 Ind. 185, 6 N. E. 600 (1886); Purdy v. Underwood, 87 Ore. 56, 169 Pac. 536 (1918); Cawston v. Sturgis, 29 Ore. 331, 43 Pac. 656 (1896).

The courts which apply the "loss-of-bargain" view for fraud in value, quality, or condition are less strict where the misrepresentations go to the quantity or boundaries of the land. So the measure of damages is reached by deducting from the purchase price a sum of money to be measured by the relative value of a tract included within the false boundary. Also where the misrepresentation relates to titles or encumbrances the courts usually allow the amount paid for the property where the title is defective, and where encumbered they allow the amount necessary to discharge the encumbrance. See (1912) 38 L. R. A. (N.S.) 465; (1907) 8 L. R. A. (N.S.) 804; McCORMICK, DAMAGES (1935) 452.

[17] Pruitt v. Jones, 14 Tex. Civ. App. 84, 86, 36 S. W. 502 (1896).

[18] Hines v. Brode, 168 Cal. 507, 511, 143 Pac. 729 (1914).

A commendable decision was reached by a California court[19] when it realized that the "loss-of-bargain" rule was extreme, and decided to apply it only in clear cases, and not where the result would be too hard on the defendant. The court took the equities of the case into consideration and decided against the majority view. This appears to be a proper handling of the case. The courts should always weigh the equities, *e.g.*, the price paid by the plaintiff, the misrepresentations of defendant as being negligent or fraudulent, and the negligence of plaintiff.

In the case at bar the plaintiff received land worth $2000, and he agreed to pay that amount for it. However, he did not receive what he expected in the land so he is given the full benefit of his agreement by application of the "loss-of-bargain" view. The "out-of-pocket" rule would give plaintiff no recovery since he was not damaged, having received land equal in value to the money he was to pay for it. There can be no recovery unless it appears that the property was worth less than he paid for it. The weakness in this view is that it does not take into consideration what the land is worth from the point of view of the buyer but rather it looks only at what the land is worth from the viewpoint of the public.

The equities are also important. The principal case furnishes a good example of how the judges can view a case in entirely different lights by looking at different equities. The majority of the court was evidently much impressed by the evidence that the defendant was guilty of fraud so they adopted the "loss-of-bargain" rule, apparently as a good means to punish him. On the other hand, the minority thought the defendant's deceit was far outweighed by plaintiff's lack of care in his reliance;[20] feeling that plaintiff deserved no relief, they applied the "out-of-pocket" rule.

Both views have a place in the ascertainment of damages. Neither should be used to the exclusion of the other.[21] Generally, the "out-of-pocket" view would seem to be a more equitable rule. But where the court considers the moral culpability of the defendant and the definiteness of the representations, and where the represented value is readily ascertainable, the "loss-of-bargain" rule should be applied.[22] There should be an attempt to avoid making the

[19]Williams v. Spazier, 134 Cal. App. 340, 21 P. (2d) 470 (1933).

[20]Principal case at p. 329: "It is difficult to understand how anyone, after inspection, could have been deceived about logged-off land. It would seem that the black stumps would speak for themselves. It is also difficult to understand why the Selmans continued to make payments after learning, in August 1933, of the shortage of wood and their alleged consequent damages." But see note 2 *supra*.

And at p. 330: "The equities of the case are not entirely with the plaintiffs."

The minority does not make this the sole basis of the opinion: "Let it be understood that this opinion is bottomed in the legal proposition that the 'benefit of the bargain' rule does not apply to the facts in this case. We have adverted to these features of the case only to refute the idea of a gross miscarriage of justice in the event the decree of the lower court is sustained."

[21]It is interesting to note that California and Texas have passed statutes requiring the application of opposed rules. California applies the "out-of-pocket" rule in all cases in the purchase, sale, or exchange of property. CAL. GEN. LAWS (Deering Supp., 1935) § 3343, p. 143. Texas applies the "loss-of-bargain" rule in cases involving transactions in real estate or in stock of corporations. TEX. STAT. (Vernon, 1936) tit. 66, art. 4004, p. 792.

[22]McCORMICK, DAMAGES (1935) ch. 18, § 121.

plaintiff suffer in his bargain—yet at the same time the defendant should not be too harshly dealt with unless it be an obvious case of intentional misleading.

Emanuel P. Snyder

Evidence: Proper disclosure during trial that defendant is insured.—Plaintiff sued for damages to his automobile alleged to have been caused by the negligence of Dennis Payne, an employee of defendant, in driving the defendant's truck against the plaintiff's car. Defendant on direct examination testified that plaintiff visited defendant and asked to see Payne, explaining that he wanted to discuss the accident with him. Defendant said he told plaintiff that Payne would be in directly, and added, "That was all that was said." On cross-examination, defendant testified that nothing was said about his paying for the damage. The witness was then asked, "Didn't you tell him you had insurance, and it was up to them to fix it up?" Upon objection by the defense, the court refused to allow the witness to answer. The Georgia Court of Appeals held that it was error to sustain the objection. The question was competent, for an affirmative answer would have indicated that the defendant did not deny, but impliedly admitted, liability for the damage. Also, an affirmative answer would have discredited the defendant as a witness by contradicting his previous testimony that "that was all that was said." *Owens v. Shugart, 61 Ga. App. 177, 6 S. E. (2d) 121 (1939).*

The courts uniformly hold that it is error to permit the plaintiff to disclose, as an independent fact, that the defendant is insured.[1] Juries are prejudiced against insurance companies and, upon learning that the defendant is insured, are less likely to consider the merits of the case in their verdict and award of damages.[2] Sporadic cases urge that one who is insured is freed of restraint induced by the pecuniary responsibility for his acts. Thus, it is said, the fact of insurance, although incidentally prejudicial, is relevant, and should be submitted to the jury for consideration on the question of care in the particular case.[3] However, no reasonable inference about the exercise of care can be drawn from defendant's being insured; that a man is likely to be more careless if insured is at most the merest guess.[4] Experience indicates that the responsible person takes out insurance. The irresponsible may not.[5] One who is insured may have a lesser motive for carefulness, but the question of motive is irrelevant in a negligence case. The issue is

[1]For collection of authorities, see note (1928) 56 A. L. R. 1418. The propriety of questions on *voir dire* concerning juror's connection with insurance companies is beyond the scope of this note. See note (1934) 20 CORNELL L. Q. 110.

[2]Holman v. Cole, 242 Mich. 402, 218 N. W. 795 (1928).

[3]Jessup v. Davis, 115 Neb. 1, 211 N. W. 190 (1926), 56 A. L. R. 1403, 1418 (1928), without precedent, adopted this view. Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726 (1936), repudiated this aberration. *See* (1936) 15 NEB. L. BULL. 185; Sims v. Martin, 33 Ga. App. 486, 126 S. E. 872 (1925) (dictum, not followed and impliedly rejected by the court in the principal case).

[4]Brown v. Walter, 62 F. (2d) 798, 800 (C. C. A. 2d 1933).

[5]Lanham v. Bond, 157 Va. 167, 160 S. E. 89 (1931).

whether or not due care was exercised, regardless of what brought it about.[6] A New Jersey case takes the singular view that upon one's taking out insurance he would naturally be of more careless disposition; but negligent disposition, like criminal disposition, although relevant and logically persuasive, confuses the issue and is too prejudicial to be admitted.[7]

The rule that it is error to disclose that the defendant is insured has, however, a broad qualification: If the fact of insurance tends to prove some material issue, or is necessarily involved in some evidence which bears upon a material issue, it will not be excluded on the ground that it may tend to prejudice the defendant. The theory is that evidence is admissible if it tends to prove one issue, even though it is not competent to prove, and is prejudicial upon, another issue.[8]

The circumstances may indicate that defendant's carrying insurance did cause him to act negligently. Where a plaintiff who was injured while riding in defendant's automobile admonished him to drive more carefully or some one would be killed, defendant's answer, "Don't worry, I carry insurance for that," is competent evidence, bearing directly upon his negligence.[9]

Facts tending to impeach a witness or discredit evidence may generally be established even though they disclose that the defendant is insured. For instance, it can be shown that a civil engineer called by defendant made his measurements at the scene of the accident at the direction of the insurance company;[10] that a lawyer testifying to his investigation of the accident represented the insurance company;[11] that a doctor appearing for the defendant examined the plaintiff at the request of, and expects to be paid by, the insurance company;[12] that photographs introduced in evidence were taken by an agent of the insurance company;[13] that written statements used to show prior contradictory statements of plaintiff's witness were taken down by a repre-

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[6]Sawyer v. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333 (1897); Edwards v. Laurel Branch Coal Co., 133 Va. 534, 114 S. E. 108 (1922); Walters v. Appalachian Power Co., 75 W. Va. 676, 84 S. E. 617 (1915).

[7]Sutton v. Bell, 79 N. J. L. 507, 77 Atl. 42 (1910).

[8]Garvey v. Ladd, 266 S. W. 727 (Kan. 1924). Sims v. Martin, *supra* note 3, and Tanner v. Smith, 97 Mont. 229, 33 P. (2d) 547 (1934), in each of which there was another ground for the admissibility of the reference to insurance, indicate that, if made immediately after the accident, it is competent as part of the *res gestae*. However, by the rule of *res gestae*, evidence otherwise incompetent is admissible only if relevant. Since the fact of insurance, without more, bears upon no issue, the position is not well taken. Lanham v. Bond, *supra* note 5.

[9]Herschensohn v. Weisman, 80 N. H. 557, 119 Atl. 705 (1923).

[10]Moniz v. Bettincourt, 24 Cal. App. (2d) 718, 76 P. (2d) 535 (1938).

[11]Robinson v. Leonard, 100 Vt. 1, 134 Atl. 706 (1926); Lander v. Shannon, 148 Wash. 193, 268 Pac. 145 (1928).

[12]Eppinger & Russell Co. v. Sheely, 24 F. (2d) 153 (C. C. A. 5th 1928); Curtis v. Ficken, 52 Idaho 426, 16 P. (2d) 977 (1932); Miss. Ice & Utilities Co. v. Pearce, 161 Miss. 252, 134 So. 164 (1931); Di Tomasso v. Syracuse Univ., 218 N. Y. 640, 112 N. E. 1057, *aff'd w. o. op.*, 172 App. Div. 34, 158 N. Y. Supp. 175 (4th Dep't 1916); *but see* Southland Greyhound Lines v. Cotten, 126 Tex. 596, 91 S. W. (2d) 326 (1936), saying at page 603, "This has been too often held improper to require citation of authority."

[13]Hodge v. Weinstock, Lubin & Co., 109 Cal. App. 393, 293 Pac. 80 (1930).

sentative of the insurance company;[14] that a general release was obtained by fraudulent representations of the insurance company's agents.[15] A fairly recent decision of the Pennsylvania Supreme Court holds that the plaintiff may not show that a witness testifying that the defendant was not negligent had settled with the defendant's insurance company claims he pressed against defendant for injuries arising out of the same accident.[16] The dissent in the case seems more sound and in line with the prior decisions of the court. Admission of the evidence would discredit the witness by showing either that he pressed claims in bad faith or was testifying falsely.

The argument that a defendant's testimony is discredited by showing that he is insured is specious.[17] By establishing that the defendant is insured against an adverse verdict, it is shown that he is not pecuniarily interested in the outcome. So plaintiff offers, in effect, to strengthen the credibility of an adverse witness.[18]

An admission which discloses that the defendant is insured is not thereby rendered incompetent. For instance, it can be shown that a dentist who denies he injured the plaintiff had notified his insurance company that he dislocated the plaintiff's jaw;[19] that defendant had insured the truck which

[14]Mideastern Contracting Corp. v. O'Toole, 55 F. (2d) 909 (C. C. A. 2d 1932); Cervillo v. Manhattan Oil Co., 226 Mo. App. 1090, 49 S. W. (2d) 183 (1932); Booth v. Coldiron, 55 Ohio App. 144, 9 N. E. (2d) 161 (1936).

[15]Arizona Cotten Oil Co. v. Thompson, 30 Ariz. 204, 245 Pac. 673 (1926); Parker v. Norton, 143 Ore. 165, 21 P. (2d) 790 (1933). See also Dermer v. Pistoresi, 109 Cal. App. 310, 293 Pac. 78 (1930) (not improper to ask if surprise story of witness was not suggested by the agent of the insurance company); Fletcher v. Saunders, 132 Ore. 67, 284 Pac. 276 (1930) (proper to show that witness visited the scene of the accident at the suggestion of the insurance company). Brown v. Walter, *supra* note 4, held it was error to ask the defendant if he had not been interviewed by the insurance agent, since there was no attempt to establish any contradiction between what he said to the agent and what he said on the stand.

[16]Kaplan v. Loev, 327 Pa. 465, 194 Atl. 653 (1937), noted (1938) 15 N. Y. U. L. Q. Rev. 447.

[17]New Jersey, it seems, stands alone in permitting the plaintiff on cross-examination to ask the defendant if he is insured. Brant v. Asarnow, 7 N. J. Misc. 803, 147 Atl. 233 (1929), *aff'd w. o. op.*, 106 N. J. L. 559, 150 Atl. 917 (1930). The court decided the case without discussion upon the authority of Day v. Donohue, 62 N. J. L. 380 41 Atl. 934 (1898), wherein, on page 383, the court stated the issue to be ". . . whether a party who is testifying in his own defense, apparently may not be asked whether it is really in his own defense that he is testifying. In other words, whether, if the truth were known about his relation to the suit as a party, it might not place his testimony as a witness in a different light." It was held that it would. The court in the *Brant* case did not cite Sutton v. Bell, *supra* note 7, which said, at page 511, "The Day case had no special application to the matter of insurance, and decided nothing as to the admissibility of such matter upon the merits, or for the purpose of discrediting the witness or affecting his credibility." The court asserted that the *Day* case rested upon special facts, but the language of the majority of the *Day* court, and the dissent, not at all adverting to the peculiar facts, repel this conclusion. The court in the *Brant* case, it seems, impliedly rejects the *Sutton* court's construction of the *Day* case, and the state returns to its original policy.

[18]Beardsley v. Ewing, 50 N. D. 373, 168 N. W. 791 (1918); Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202 (1904); 3 Wigmore, Evidence (3d ed. 1940) § 969.

[19]Hill v. Jackson, 272 S. W. 105 (Mo. App. 1925), held it was error to ask defendant if he had not so reported to the insurance company, because counsel for plaintiff knew that he had not, the sole purpose of the question being to inform the jury that defendant

he denies he owns;[20] that defendant-employer carries indemnity insurance for the acts of one who he claims is employed by an independent contractor.[21]

One who is insured generally discloses this to the injured party. Where the reference to insurance is an integral part of the admission, the entire statement is admissible.[22] Most courts hold that the reference to insurance must be omitted if it can be done without substantially impairing the natural force of the admission.[23] Some courts maintain a less tenable position and permit the reference to insurance, even though it is separable from the admission, if it tends to corroborate plaintiff's testimony that defendant admitted liability.[24] A bare unsupported allegation that the defendant admitted liability might appear extremely unreasonable, and, it is said, the plaintiff may make it more credible by showing that in connection therewith the defendant also said he was insured. One who is insured would be more likely to acknowledge a fault. It seems, however, that the prejudicial effect of the reference to insurance would outweigh its corroborative value. Since the competency of this evidence is based upon its corroborative value, it seems that logically these courts should also hold that it is permissible to support an alleged admission by showing that the defendant is insured, even though he made no reference to insurance in his admission; it is the fact of insurance which is corroborative. This apparently is not considered in the cases.

Often it is alleged that the defendant, although not expressly admitting

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was insured. If counsel were not certain, and could not establish that he had grounds to believe a report had been made, fair dealing requires that the question first be asked outside of the hearing of the jury. In Grant v. Nat'l Ry. Spring Co., 100 App. Div. 234, 237, 91 N. Y. Supp. 805 (4th Dep't 1905), it is said: "The asking of a question clearly incompetent, and not for the purpose of eliciting any material evidence, but with the ulterior design of disclosing the fact that an insurance company is interested in the litigation, is condemned. It is only when the question is incompetent and immaterial, however, that the motive of counsel is to be considered."

[20]Paepke v. Stadelman, 222 Mo. App. 346, 300 S. W. 845 (1927); Harper v. Highway Motor Freight Lines, 89 S. W. (2d) 448 (Tex. Civ. App. 1935).

[21]Moore-Handley Hardware Co. v. Williams, 189 So. 757 (Ala. 1939); Curcic v. Nelson Display Co., 19 Cal. App. 46, 64 P. (2d) 1153 (1937); Biggans v. Wagner, 60 S. D. 581, 245 N. W. 385 (1932).

[22]Reid v. Owens, 93 P. (2d) 680 (Utah 1939). The theory of a suit against the father for injuries allegedly caused by the negligent driving of his automobile by his son was that the father permitted him to use the car knowing he was a careless driver. The reference by the father to his insurance in the following statement made soon after the accident was held to be "freighted with admission" and competent: "My boy is careless and he drives too fast and it worries us. We have taken out insurance to protect him." *Accord,* Flieg v. Levy, 148 App. Div. 781, 133 N. Y. Supp. 249 (2d Dep't 1912), *aff'd w. o. op.,* 208 N. Y. 564, 101 N. E. 1102 (1913). See *infra* note 28.

[23]In Anderson v. Mothershead, 19 Cal. App. 97, 64 P. (2d) 995 (1937), the following reference to insurance was separable: ". . . he mumbled something about he couldn't help his actions, and that he did not see the car, and said he was sorry, but he couldn't help it, but he says, 'I have got full coverage'." *Accord,* Kuhn v. Kjose, 216 Iowa 36, 248 N. W. 230 (1933). In McCurdy v. Flibotte, 83 N. H. 143, 145, 139 Atl. 367 (1927), the court said: "No strict rule for the exercise of the court's discretion in such respect can be laid down beyond the general rule of the legal policy to exclude evidence of the insurance 'wherever it is practicable to do so'."

[24]Garvey v. Ladd, *supra* note 8.

that he was at fault, "said he had full coverage,"[25] or "said he was covered with insurance, and he would see the insurance company about it,"[26] or "said he was very sorry of course, and told me to go ahead and do all I could for the boy; to let no money stand in the way; he was fully insured for it; he would take care of it."[27] These statements have been held inadmissible. In the principal case the court held that had the defendant answered the inquiry about paying for the damage with the statement that "he had insurance and it was up to them to fix it up," he would have impliedly admitted liability for the damage. The New York Court of Appeals has held it error to admit the testimony of plaintiff's witness that, upon asking the defendant what he intended to do about the accident, he replied, "Nothing, we hold insurance and you have to see the insurance."[28]

The statements of the defendant in the principal case seem to be an expression of indifference about liability, rather than an admission of fault.[29] We impute to a person a duty to deny fault when any other reaction on his part would be wholly unnatural.[30] The defendant here is pecuniarily disinterested, and it is understandable that he should consider it pointless to provoke a dispute by denying that his employee was negligent. His attitude might be that he has no objections to the injured party's getting something from the insurance company, even though there has been no legal wrong. When one refers another to his insurance company, or indicates that his insurance company will pay, he may merely be giving expression to the widespread belief that the insurance company is liable for all damage regardless of who is at fault.[31] At least the statement is open to various constructions,

[25]Schlenker v. Egloff, 24 P. (2d) 224 (Cal. 1933).

[26]Van Dyke v. Knoll, 262 Mich. 644, 247 N. W. 768 (1933).

[27]Whitman v. Carver, 337 Mo. 1247, 88 S. W. (2d) 885 (1935).

[28]Rodzborski v. American Sugar Refining Co., 210 N. Y. 262, 104 N. E. 616 (1912) (without, however, discussing its incompetency as an admission). It is submitted that the law of New York is in accord with the rules indicated in this note. Broad statements by the courts have confused the problem, but the holdings of the Court of Appeals are consistent. Simpson v. Foundation Co., 201 N. Y. 479, 95 N. E. 10 (1909) (held error for plaintiff to elicit from his witness that in an interview with the general superintendent of the defendant company two attorneys were present who were introduced as representing an insurance company); Akin v. Lee, 206 N. Y. 20, 99 N. E. 85 (1912) (held error to ask defendant: "You told Mr. Akin that you were insured against such accidents, didn't you?"); Flieg v. Levy, *supra* note 22 (held that a reference to insurance in an admission of ownership was competent); Di Tomasso v. Syracuse Univ., *supra* note 12 (upon certified question, held not improper to show that doctor for defendant examined the plaintiff at the request of the insurance company). *But cf.* Toombs v. Texas Oil Co., 145 Misc. 762, 260 N. Y. Supp. 773 (City Court, Bronx County, 1932), which, without citing the *Di Tomasso* case, held it was error to show that a doctor called by defendant was asked to appear at the trial by the insurance company. Defendant was not permitted to disclose the doctor's relations with the insurance company. See also Tincknell v. Ketchum, 78 Misc. 419, 139 N. Y. Supp. 620 (Sup. Ct., Cayuga County, 1912), which held that an admission containing a reference to an insurance company was incompetent, relying upon a dictum in Manigold v. Black River Traction Co., 81 App. Div. 381, 80 N. Y. Supp. 861 (4th Dep't 1903), that a reference to insurance is not competent under any circumstances.

[29]McCurdy v. Flibotte, *supra* note 23; Duke v. Parker, 125 S. C. 442, 118 S. E. 802 (1923).

[30]4 WIGMORE, EVIDENCE (3d ed. 1940) § 1060.

[31]Kuhn v. Kjose, *supra* note 23.

and this prejudicial information should not be given to the jury on the basis of conjecture.

It is generally competent to show that the testimony of a witness is false. Clearly an acknowledgment by the defendant that he did refer the plaintiff to his insurance company would contradict his testimony that nothing else was said. However, where questions are embarrassing or prejudicial and their evidentiary value slight, the right of cross-examination may be subject to the discretion of the trial court.[32] Plaintiff, in a case in a Federal District Court, was prevented from putting into evidence a written statement the defendant's witness made to an insurance agent. The statement contained nothing contradictory to his testimony, but at the bottom was the attestation that the witness read the paper before signing, which plaintiff demonstrated was not true. The court held that the evidence had only the slightest possible importance in impeaching him and, because of its prejudicial effect, was inadmissible.[33] It has been said that "the fact of insurance may incidentally and unavoidably appear. But even this should not be permitted on slight or for specious reasons."[34] It is submitted that the ruling of the trial court in the principal case should have been upheld.

An examination of the cases indicates that it is the unusual situation which does not afford an opportunity legitimately to inform the jury during trial that the defendant is insured.

Bernard R. Rapoport

Libel: Liability for transmission of defamatory telegraph message: Exception to Erie R. R. v. Tompkins.—In *O'Brien v. Western Union Telegraph Company, 113 F. (2d) 539 (C. C. A. 1st 1940),* it was held proper for a trial judge to refuse to rule that a telegraph company was, as a matter of law, not privileged in transmitting a message containing "obviously defamatory statements." In reaching this decision the court stated that it was not bound by the common law or the statutes either of Massachusetts, where the message originated, or of Michigan, where it was delivered.

State and federal courts which have had occasion to pass on this question[1] tend to follow the rule that a telegraph company is privileged in transmitting telegrams defamatory on their face, if it does so in "good faith" and is not guilty of negligence.[2] Whether the company's operator was negligent in

[32]Gerry v. Neugebauer, 83 N. H. 23, 136 Atl. 751 (1927).
[33]Brown v. Walter, *supra* note 4.
[34]Peichuck v. Magusiak, 82 N. H. 429, 135 Atl. 534 (1926).

[1]There have been very few decisions on this point. Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message* (1920) 20 COL. L. REV. 30, 369; Flynn v. Western Union Tel. Co., 199 Wis. 124, 126, 225 N. W. 742 (1929). Neither Massachusetts nor Michigan decisions directly in point have been found, hence the propriety of the court's statement that it was not bound by the state law is a theoretical problem. *Cf.* Rogers v. Postal Tel. Cable Co. of Mass., 265 Mass. 544, 164 N. E. 463 (1929); Bacon v. Michigan Central R. R., 66 Mich. 166, 33 N. W. 181 (1887).

[2]Western Union Tel. Co. v. Cashman, 149 Fed. 367, 371 (C. C. A. 5th 1906); Nye v. Western Union Tel. Co., 104 Fed. 628, 631 (C. C. D. Minn. 1900); Paton v.

accepting the message, and whether the transmission was in "good faith" are questions to be left for the jury.[3] In refusing to rule that as a matter of law the defendant was not privileged to transmit the message in question, *O'Brien v. Western Union Telegraph Company* followed all the authorities.

In holding that the court was not bound to follow either Massachusetts or Michigan decisions,[4] the *O'Brien* case attempts to exempt the problem presented from the doctrine of *Erie R. R. v. Tompkins*[5] which, reversing almost a century of authority based on *Swift v. Tyson*,[6] held that there was no "federal common law" and that each federal court was to apply the law of the state in which the cause of action accrued. Mr. Justice Brandeis, author of this epochal opinion, stated the exceptions to the rule: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."[7] Under these exceptions it has been held that the treaties with the Indians gave the Federal Government complete rights over the tribes and in a suit by the United States to protect these rights a federal court would not be bound by local law;[8] and in a dispute concerning a collective labor agreement with an interstate railroad, the Railway Labor Act[9] was held controlling and state law not applicable.[10] The *O'Brien* case is placed in this class of exceptions to the doctrine of *Erie R. R. v. Tompkins* by virtue of Sections 202, 206 and 207 of the Federal Communications Act.[11] Section 202 prohibits discrimination in rates or services; Sections 206 and 207 declare the carrier's liability for damages due to any unlawful act. On the basis of these sections, the court in the *O'Brien* case held that the extent of the liability of a telegraph company for the transmission of a defamatory message is to be decided without reference to state law. We must note, however, that the language of Sections 202, 206 and 207 is almost identical with that of corresponding Sections 3 (1), 8 and 9 of the Interstate Commerce Act,[12] and therefore the interpretation of the Interstate Commerce Act "will conclusively" apply to the similar sections of the Communications Act.[13] The Supreme Court of the United States interpreted these sections of the Interstate Commerce Act

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Great Northwestern Tel. Co. of Canada, 141 Minn. 430, 170 N. W. 511 (1919); Peterson v. Western Union Tel. Co., 65 Minn. 18, 23, 67 N. W. 646 (1896); Smith, *supra* note 1, at 384.

[3]Bacon v. Michigan Central R. R., 66 Mich. 166, 33 N. W. 181 (1887); Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646 (1896). *But cf.* Nye v. Western Union Tel. Co., 104 Fed. 628 (C. C. D. Minn. 1900) (held not enough evidence for the jury).

[4]See note 1 *supra.*

[5]304 U. S. 64, 58 Sup. Ct. 817 (1938).

[6]16 Pet. 1, 10 L. ed. 865 (U. S. 1842).

[7]304 U. S. 64, 78, 58 Sup. Ct. 817 (1938).

[8]Board of Commissioners of Jackson County, Kansas v. United States, 308 U. S. 343, 60 Sup. Ct. 285 (1939).

[9]44 STAT. 577 (1926), as amended 48 STAT. 1186 (1934), 45 U. S. C. A. §§ 151 *et seq.* (Supp. 1939).

[10]Illinois Central R. R. v. Moore, 112 F. (2d) 959 (C. C. A. 5th 1940).

[11]48 STAT. 1070 (1934), 47 U. S. C. A. §§ 202, 206, 207 (Supp. 1939).

[12]41 STAT. 479 (1920), as amended 49 STAT. 607 (1935), 49 U. S. C. A. § 3(1) (1929); 24 STAT. 382 (1887), 49 U. S. C. A. § 8 (1929); 24 STAT. 382 (1887), 49 U. S. C. A. § 9 (1929).

[13]Stanley v. Western Union Tel. Co., 23 F. Supp. 674, 675 (S. D. Fla. 1938).

as being applicable only to cases that were based on a *failure to comply with some provision* of said Act.[14] *O'Brien v. Western Union Telegraph Company* involved no such failure—it concerned merely the definitive limits of a particular tort. The *Erie* case involved the liability of a railroad for injuries caused by negligent operation of its trains, and the court ignored these sections of the Interstate Commerce Act, declaring that state law was applicable. It would seem, therefore, that the court was at least inconsistent in the *O'Brien* case in relying on Sections 202, 206 and 207 of the Communications Act as the basis for making the case an exception to the rule of *Erie R. R. v. Tompkins.*

Cases interpreting the rule of the *Erie* case have made exceptions to the rule other than the express "matters governed by the Federal Constitution or by Acts of Congress." It has generally been held that *Erie R. R. v. Tompkins* applied only to substantive law and not to procedural problems.[15] Questions of jurisdiction and venue are decided without regard to state law.[16] Although what is "substance" and what is "procedure" has been the subject of much argument, it is clear that the rules regarding the privilege to defame involved in *O'Brien v. Western Union Telegraph Company* are matters of substantive law.

To accept as authoritative the expression that state law was not to be followed in the *O'Brien* case, when (a) the problem was clearly one of substantive law and (b) was not controlled by an Act of Congress, would be so great a departure from the doctrine of *Erie R. R. v. Tompkins* as to tend to nullify it. Whether the expediency of having a uniform rule of liability for an interstate company warrants such nullification is for the Supreme Court of the United States to decide, keeping in mind such legislative intent as may be discernible.

Jack L. Ratzkin

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[14]Galveston, *etc.* R. R. v. Wallace, 223 U. S. 481, 490, 32 Sup. Ct. 205 (1912); Atlantic Coast Line R. R. v. Riverside Mills, 219 U. S. 186, 21 Sup. Ct. 164 (1911).

"There was no need for Congress to declare as existent the fundamental right of recovery for breach of contract or the perpetration of a tort, and it did not by such Federal Communications Commission Act enact such a useless statute." Stanley v. Western Union Tel. Co., 23 F. Supp. 674, 676 (S. D. Fla. 1938).

[15]304 U. S. 64, 79-80, 58 Sup. Ct. 817 (1938). *See* Gallagher *et al.* v. Carroll *et al.*, 27 F. Supp. 568, 570 (E. D. N. Y. 1939). While the cases differ as to which problems are "substantive" and which are "procedural," they all agree that *Erie R. R. v. Tompkins* applies only to substantive problems. Hence, in Moore v. Chicago, B. & Q. R. R., 28 F. Supp. 804 (W. D. Mo. 1939), it was held that presumptions and inferences from the facts were procedural and the state rules not applicable. The question of the burden of proof was held procedural. Cities Service Co. v. Dunlap, 10 F. (2d) 314 (C. C. A. 5th 1939). *Contra:* Sampson v. Channell, 110 F. (2d) 754 (C. C. A. 1st 1940); Equitable Life Assurance Society v. MacDonald, 96 F. (2d) 437 (C. C. A. 9th 1938); Schopp v. Muller Dairies, Inc., 25 F. Supp. 50 (E. D. N. Y. 1938). A federal rule of damages was followed in disregard of the *Erie* doctrine in Twachtman v. Connelly, 106 F. (2d) 501 (C. C. A. 6th 1939), criticized in note (1940) 6 U. OF PITT. L. REV. 214; *cf.* Vaigneur v. Western Union Tel. Co., 34 F. Supp. 92 (E. D. Tenn. 1940). For a thorough review of this question see Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333; Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie R.R. v. Tompkins* (1939) 34 ILL. L. REV. 271.

[16]Stephenson v. Grand Trunk Western R.R., 110 F. (2d) 401 (C. C. A. 7th 1940); Carby v. Greco *et al.*, 31 F. Supp. 251 (W. D. Ky. 1940); Hedrick v. Canadian Pac. R.R., 28 F. Supp. 257 (S. D. Ohio 1939).

Municipal Corporations: Distinction between governmental and proprietary functions: City's cooperation with W.P.A.—In *Duren v. City of Binghamton, 283 N. Y. 467, 28 N. E. (2d) 978 (1940),* the city of Binghamton was the lessee of a building, the lease specifying that the building was to be used for relief purposes. The City's Department of Welfare used the building as a warehouse and distribution depot for commodities, donated by the federal government to the city, to be given to the poor. Thereafter, the city permitted the Works Progress Administration to use, without charge, part of the building as premises for a sewing project, the products to be delivered to the Welfare Department. The city also provided light, heat, insurance and certain materials for the project, while the federal agency employed and paid the workers, all of whom as a requisite for employment had to be on the city's relief rolls. The W.P.A. employees were invited to use a corridor to reach the lavatory and drinking water facilities, which were in the other part of the building. The sides of the corridor were lined with barrels of flour, one of which, through the carelessness of an employee of the city, struck the plaintiff as she was going to get a drink of water. The Court of Appeals assumed for the purposes of the appeal that providing relief for the indigent was a governmental duty, and the city might claim immunity from liability for negligence of persons employed in carrying out that duty. The court held that this immunity would not extend to the failure of the city to perform its duty to exercise reasonable care to maintain in a safe condition the corridor which it invited the W.P.A. workers to use.

The powers and duties of a municipal corporation fall into two categories: governmental and proprietary.[1] In its governmental activities the municipal corporation functions as an agent of the state for the benefit of the public generally, and not to promote the private interests of the local community, for example, in matters pertaining to public health,[2] education of the young,[3] prevention of fire,[4] prevention of crime[5] and care of the poor.[6] The city in the performance of these public services is immune, unless made liable by statute or charter, from private action for injuries resulting from the wrongful acts of its agents. The proprietary activities of a municipality provide for the local necessities and conveniences of the citizens, in which of course the municipality has a private interest, for example, in the operation and maintenance of water and light plants[7] or a railroad belt,[8] the construction and repair of sewers,[9] and any business conducted for profit.[10] The

[1]See 6 McQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1937) § 2792.

[2]Benton v. Santa Monica, 106 Cal. App. 339, 289 Pac. 203 (1930); Foster v. Capital Gas & Electric Co., 125 Kan. 574, 265 Pac. 81 (1928); 6 McQUILLAN, *op. cit. supra* note 1, § 2840.

[3]Titusville Iron Co. v. New York, 207 N. Y. 203, 100 N. E. 806 (1912).

[4]Hall v. Jackson, 30 F. (2d) 935 (C. C. A. 5th 1929).

[5]Dist. of Col. v. Totten, 55 App. D. C. 312, 5 F. (2d) 374 (1925).

[6]Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1928); Lefrois v. County of Monroe, 162 N. Y. 563, 57 N. E. 185 (1900); Maxmilian v. Mayor of City of New York, 62 N. Y. 161 (1875); 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 1661; 6 McQUILLAN, *op. cit. supra* note 1, § 2796, n. 61.

[7]Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760 (1906).

[8]Davis v. New Orleans Public Belt R.R., 155 La. 504, 99 So. 419 (1923).

[9]Baker & Co. v. Hollis, 169 Okla. 253, 36 P. (2d) 757 (1934).

[10]O'Donnell v. N. Attleboro, 212 Mass. 243, 98 N. E. 1084 (1912).

municipality in the performance of these proprietary functions is bound by all the rules of law and procedure applicable to any other corporation or individual engaged in like enterprise. These rules are elementary, but there is much difficulty in applying them. The line of demarcation between private and public activities is often very tenuous.

The doctrine exempting a municipal corporation from private action for torts resulting from the performance of its governmental functions has been criticized by eminent authority.[11] The arguments presented in favor of the doctrine are: (1) the city in performing public services is the agent of the state, and partakes of the sovereign's immunity to private suit;[12] (2) to recognize these damage claims would deplete public funds and hamper necessary governmental activities;[13] (3) city employees are the representatives of the injured person as well as other taxpayers, and he is as much at fault in failing to provide prudent city employees as any other taxpayer.[14]

It seems more just to permit these claims and spread the risk, the increased taxation operating as a form of insurance. However, the rule is established in New York by inveterate precedent, and for any modifications we must look to the legislature.[15] The legislature has in several instances abrogated the common law and imposed liability on the city for the governmental acts of its agents.[16]

The Appellate Division[17] in considering the principal case declared that a city's immunity from suit arises only in connection with the discharge of a governmental function directed and required by a state statute. The court maintained that since there was no statutory requirement that the city accept the gift of the federal goods, the city in storing these commodities acted in a proprietary capacity. Similarly, since there was no statutory requirement that the city participate in the manufacturing venture of the W.P.A., the city in permitting the W.P.A. to use the premises assumed the duties of a landlord, among which is the duty of keeping a common passageway safe.[18]

It is submitted that the court's premise is unsound: it is immaterial whether a governmental activity is imposed or voluntarily assumed.[19] The

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[11]Workman v. New York, 179 U. S. 552, 574, 21 S. Ct. 212 (1900); Evans v. Berry, 262 N. Y. 61, 186 N. E. 203 (1933); Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919); CARDOZO, LAW AND LITERATURE (1931) 57; Borchard, *Governmental Responsibility in Tort* (1928) 28 COL. L. REV. 577, 735; Tooke, *The Extension of Municipal Liability in Tort* (1932) 19 VA. L. REV. 97.

[12]JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS (1892) § 27. See also Scales v. Winston-Salem, 189 N. C. 469, 127 S. E. 543 (1925).

[13]Burnett v. Rudd, 165 Tenn. 238, 54 S. W. (2d) 718 (1932).

[14]Nicholson v. Detroit, 129 Mich. 246, 249, 88 N. W. 695 (1902).

[15]CARDOZO, LAW AND LITERATURE (1931) 57.

[16]Municipalities have been made liable for malpractice by physicians and dentists in public institutions (GENERAL BUSINESS LAW § 50-d, fol. 90) and for negligence of their employees in the operation of municipal motor vehicles (GENERAL MUNICIPAL LAW §§ 50-a, 50-b, 50-c).

[17]258 App. Div. 694, 18 N. Y. S. (2d) 518 (4th Dep't 1940).

[18]Loucks v. Dolan, 211 N. Y. 237, 105 N. E. 411 (1914).

[19]Pope v. New Haven, 91 Conn. 79, 99 Atl. 51 (1916); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917); Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289 (1884); Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512 (1918); Van Dyke

essential question in deciding immunity from suit is whether the function was governmental. Authority and reason favor this proposition. There is no sound basis for imposing liability when a city voluntarily enters upon a public service and withholding it when it performs the service under a requirement of imperative law. To maintain this distinction would not encourage cities voluntarily to make provision for the public good.

However, there is a statutory direction which the court, in its opinion, did not consider. The Public Welfare Law[20] provides: "A city public welfare district shall be responsible in its territory for the administration of public relief and care and the expense incident thereto." It further provides:[21] "It shall be the duty of public welfare officers insofar as funds are available for that purpose, to provide for those unable to maintain themselves. They shall, *whenever possible,* administer such care and treatment as may restore such persons to a condition of self-support, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges." True, the statute does not in specific terms direct the acceptance of the federal goods or coöperation with the W.P.A. The Public Welfare Law, however, does not purport specifically to delineate the various ways in which its purpose may be accomplished. The whole tenor of the statute indicates that that is to be left to the discretion of the welfare officials.

Since care of the poor is a public function, and in determining municipal immunity it is immaterial whether there is a statutory requirement that a governmental activity be performed, the question resolves itself into a consideration whether the particular means selected by the public welfare officials do relieve the needy.

An essential and customary part of every relief program is the distribution of food products. The city may claim immunity from the negligence of persons employed in this governmental activity.[22] The Court of Appeals assumed this to be correct for the purposes of the appeal. Had the suit been by a person employed by the city to distribute these goods, based on the failure of the city to provide a safe place to work, quite clearly his claim would be rejected; similarly if the suit involved the claim of an indigent person who went to get some relief commodities.

The above examples, however, are distinguishable from the principal case: there the injuries arose from the negligent performance of the governmental function of delivering goods to the poor. Here the injury arose from the city's having leased part of the building to the W.P.A. If the leasing was a proprietary function, then the city assumed the duties of a landlord. Leasing, however, is not in and of itself a proprietary act. Had the city leased part of its premises without rent to the Department of Water Supply or the Department of Correction, it would not be liable for negligence toward persons engaged in those departments, or persons who visited those departments to

v. Utica, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th 1922); Moulton v. Fargo, 39 N. D. 502, 167 N. W. 717 (1918); 6 McQUILLAN, *op. cit. supra* note 1, § 2797.

[20]Art. 5, § 31.

[21]Art. 9, § 77.

[22]See note 6 *supra.*

pay their taxes or fees.[23] Those departments perform municipal functions, and the housing of them is a governmental function. However, where the city leases part of a municipal building for hire and a person invited to a private entertainment is injured through the negligence of the city, it is clear that the city is deprived of its immunity to suit.[24]

These instances do not precisely fit this case either: the W.P.A. is not a municipal agency, nor, on the other hand, does the city derive any money from permitting the premises to be used. The Court of Appeals asserted that the city voluntarily assisted the W.P.A. project as a convenient means of reducing the burden of providing relief to the indigent. The city in inviting the W.P.A. workers to use the corridor assumed a duty toward persons who were not beneficiaries of the city relief work, and for damages caused by a breach of that duty the city is liable. That the assistance to the W.P.A. was voluntary, we have seen, is immaterial.[25] This was not merely a convenient means of reducing the burden of providing relief for the indigent. The W.P.A. sewing project accomplished two savings: It reduced the cost of goods to be supplied to the city's destitute because the wages of persons engaged in the sewing project were paid by the government, and, secondly, it took persons off the relief rolls, from which all W.P.A. workers on this project were selected, and made them wage-earners. The motive of the city in assisting the project was to reduce the cost of caring for the indigent or leave it free to expend the same amount and accomplish more. *Also,* it seems the city's motive was to follow the mandate of the Public Welfare Law which required the public welfare officials, whenever possible, to administer such care and treatment to those unable to maintain themselves as may restore such persons to a condition of self-support.[26] Clearly W.P.A. workers are more self-supporting than recipients of relief certificates.

That the W.P.A. workers were not beneficiaries of the city is disputable, for without the actions of the city they would still be on relief. In any event, this is generally regarded as an immaterial consideration. The liability of a municipality for the torts of its agents does not depend on the relationship existing between the city and the person injured, but depends on the capacity in which the city was acting.[27]

It is submitted that the city's participation with the W.P.A. was in furtherance of a governmental activity—relief of the poor.[28] Perhaps the Court of Appeals sought to pursue a "liberal" policy in accordance with the present

[23]Kelley v. Boston, 186 Mass. 165, 71 N. E. 299 (1904).

[24]Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185 (1881).

[25]See note 18 *supra.*

[26]See note 20 *supra.*

[27]City of Kokomo v. Loy, 185 Ind. 18, 112 N. E. 994 (1916); Wilcox v. Rochester, 190 N. Y. 137, 82 N. E. 1119 (1907); 6 McQUILLAN, *op. cit. supra* note 1, § 2795.

[28]The opinions of the courts which considered this case do not touch on this vital question: was the housing of the project by the city a prerequisite of securing W.P.A. assistance for Binghamton or was it a mere accommodation? If it was a condition, then in complying with it to accomplish a public service the city was engaged in a governmental activity and assumed none of the liabilities of an ordinary landlord. On the other hand, if it was a gratuitous act, then it involved no public benefit and the city is liable to this plaintiff. The indications are that it was part of the initial arrangements and an inducing factor.

tendency to limit the doctrine of municipal immunity. That, however, should be left to the legislature. When the courts undertake to misapply or distort the established rules to give a remedy in a particular case, they intensify the confusion and unpredictability already existing in the distinction between governmental and proprietary functions.

Bernard R. Rapoport

Practice: Rule 294 of New York Rules of Civil Practice: Application to compromise infants' claims.—Courts of England and the United States have long looked upon the protection of the rights of infants as their special responsibility.[1] In fulfilling this duty, therefore, it is not surprising that a compromise of an infant's claim has been held to require the approval of a court before it is binding against the infant.[2] There arose, however, a real need for a procedure which would fully acquaint the court with the facts of the proposed settlement in order to insure a full protection of the infant's rights.

The history of Rule 294 of the Rules of Civil Practice of New York tells the story of the development of such a procedure. Prior to the adoption of the Rules of Civil Practice,[3] there had been in infant settlement cases no general[4] procedural provisions for informing the courts of facts essential to the protection of the infant's claim.[5] Therefore, Rule 294[6] was included as a new rule although its forerunner had been found in the Rules of the Surrogate Court of New York County.[7]

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[1]*In re* Badger, 286 Mo. 139, 226 S. W. 936 (1920); De Gristina v. Swift & Co., 158 Misc. 91, 285 N. Y. Supp. 34 (Sup. Ct. 1936); People v. Kane, 79 Misc. 140, 139 N. Y. Supp. 350 (Sup. Ct. 1913), *aff'd mem.*, 161 App. Div. 956, 146 N. Y. Supp. 1105 (2d Dep't 1914); City of New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N. Y. Supp. 1085 (Mun. Ct. N. Y. 1904); Butler v. Freeman, Ambl. 301, 27 Eng. Rep. 204 (Ch. 1756); Eure v. Shaftsbury, 2 P. Wms. 103, 24 Eng. Rep. 659 (Ch. 1722).

[2]The Etna, 8 F. Cas. No. 4,542, 1 Ware 474 (D. Me. 1838); Mathews v. Doner, 292 Ill. 592, 127 N. E. 137 (1920); Williams v. Williams, 204 Ill. 44, 68 N. E. 449 (1903); Joyce v. Washington Storage Warehouse & Van Co., 176 App. Div. 176, 163 N. Y. Supp. 519 (1st Dep't 1917); Edsall v. Vandemark, 39 Barb. 589 (N. Y. 1863).

[3]The Rules of Civil Practice were adopted by a convention of justices, lawyers and members of legislative committees in June, 1920 and became effective October 1, 1921, thereby supplanting the General Rules of Practice.

[4]But see NEW YORK JUDICIARY LAW § 474 (as amended L. 1912, c. 229, effective Sept. 1, 1912).

[5]However, in Matter of Reifschneider, 60 App. Div. 478, 69 N. Y. Supp. 1069 (3d Dep't 1901), the defendant attorney was formally reprimanded for presenting a proposed settlement of an infant's claim without disclosing to the court the fact that he was regularly engaged by the defendant to consummate such compromises. *See* Matter of Wilbur, 228 App. Div. 197, 200, 239 N. Y. Supp. 483 (1st Dep't 1930).

[6]"On any application for the approval by the court of a settlement of a cause of action belonging to an infant the court shall require the attorney so applying to disclose his relation to the defendant, and whether he has become concerned in the application of its subject matter at the instance of such defendant, or has received or is to receive any compensation from such defendant and the amount thereof, or has any part in negotiating such settlement; and thereupon, if the court or judge deem it necessary, a full examination may be had into all the facts regarding the reasonableness and propriety of such settlement."

[7]Rule XXII, as amended Nov. 13, 1920, read: "Compromise. Upon application for

Practice under the new rule was uncertain. Although the rule on its face was unequivocal, it became common for attorneys to neglect both to get court orders and to submit the papers required by Rule 294. The frequency with which the requisites of the rule were disregarded came to light as a result of the Ambulance Chasing Investigation in New York City in 1930. Disciplinary proceedings were instituted against several members of the bar for failure to apply for orders approving the settlements,[8] among other charges of misconduct. The defense interposed was a well-recognized custom of disposing of trivial cases without the formality of obtaining an order of compromise and an understanding that the requirement of a court order was not mandatory in small cases. As a result of the court's failure to accept this explanation, the defendants were either censured or suspended.[9]

Another group of disciplinary proceedings arose out of the failure of many attorneys to obtain court orders fixing attorney's fees in settlement cases in compliance with Section 474 of the Judiciary Law[10] and Rule 294.[11] As a result some members of the bar were either disbarred,[12] suspended[13] or cen-

leave to compromise it should appear by the affidavit by petitioner's attorney that he has investigated the subject matter of the compromise or the facts of any alleged cause of action whether or not the attorney has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed or at the instance of any representative of such party." There were also special instructions to attorneys in regard to compliance with the rule setting forth the specific information to be included within the affidavit. The revised rule of the New York County Surrogate covering compromises is now Rule XVIII as adopted Nov. 15, 1935.

[8]Matter of Batt, 230 App. Div. 656, 246 N. Y. Supp. 77 (1st Dep't 1930); Matter of Linden, 228 App. Div. 497, 240 N. Y. Supp. 274 (1st Dep't 1930); Matter of Kreizvogel, 228 App. Div. 490, 240 N. Y. Supp. 314 (1st Dep't 1930); Matter of Uran, 227 App. Div. 496, 238 N. Y. Supp. 596 (1st Dep't 1930); Matter of Springer, 227 App. Div. 490, 238 N. Y. Supp. 591 (1st Dep't 1930); Matter of Seligsohn, 227 App. Div. 480, 238 N. Y. Supp. 627 (1st Dep't 1930).

[9]Matter of Batt, 230 App. Div. 656, 246 N. Y. Supp. 77 (1st Dep't 1930) (severe censure); Matter of Linden, 228 App. Div. 497, 240 N. Y. Supp. 274 (1st Dep't 1930) (not disciplined for single failure to obtain order but two year suspension for other reasons); Matter of Kreizvogel, 228 App. Div. 490, 240 N. Y. Supp. 314 (1st Dep't 1930) (censure); Matter of Uran, 227 App. Div. 496, 238 N. Y. Supp. 596 (1st Dep't 1930) (censure); Matter of Springer, 227 App. Div. 490, 238 N. Y. Supp. 491 (1st Dep't 1930) (suspension for one year); Matter of Seligsohn, 227 App. Div. 480, 238 N. Y. Supp. 627 (1st Dep't 1930) (suspension for one year). It should be recognized, however, that in each of these cases other charges of professional misconduct were proved.

[10]Section 474, among other provisions as to compensation of an attorney, requires that an attorney must obtain a court order fixing his fees in the case of a compromise of an infant's cause of action.

[11]Rule 294 as in force from 1921 to 1939 required that the attorney for an infant plaintiff who seeks leave to compromise must disclose whether he "has received or is to receive any compensation from such defendant and the amount thereof, . . ." See *supra* note 6.

[12]Matter of Gordon, 229 App. Div. 88, 241 N. Y. Supp. 263 (1st Dep't 1930) (solicitation of negligence cases and submission to court of false affidavits also proved).

[13]Matter of Fieldsteel, 228 App. Div. 470, 240 N. Y. Supp. 481 (1st Dep't 1930) (two year suspension; solitication of personal injury cases also proved); Matter of Vail, 228 App. Div. 217, 239 N. Y. Supp. 414 (1st Dep't 1930) (six month suspension; solicitation of negligence cases also proved). In the former case the court expressed its disapproval of agreements between a doctor and lawyer by which the former recommends the attorney and the latter acts as collector of medical fees by deducting that amount from the sum due to the client.

sured.[14] It came to light that certain judges of the Municipal Court of New York City did not require such orders due to the erroneous impression that Section 474 did not apply to the Municipal Court. Some judges of that court even refused to fix the attorney's compensation although an order had been submitted to them.[15] This practice on the part of the Municipal Court was specifically condemned by the Appellate Division.[16] Attorneys in these cases, however, were not held responsible for the court's failure to act since they had attempted to comply with the law by submitting the orders.

A third practice grew up under the provisions of Rule 294 which was far more widespread in its use. That involved the settlement of infants' claims against an insured defendant. It was common practice for the representative of the insurance company to suggest to the parent of the injured infant a compromise of the claim against its insured. Upon acceptance by the parent, the latter would be directed to an "outside attorney" who, although not on the company's legal staff, was friendly to it. This attorney would draw the necessary papers for the appointment of the parent as guardian *ad litem* and would, by arrangement, serve a summons on the company's attorney. Upon the filing of a notice of appearance by the latter, the attorney "representing" the infant would then petition the court for leave to compromise for the agreed amount. After the granting of an order to the guardian *ad litem* for leave to compromise, both the guardian's bond and the attorney's fee would be paid by the insurance company.

The ethical character of this practice had been questioned before the inclusion of Rule 294 in the Rules of Civil Practice even though the attorney had made full disclosure of the facts to the court.[17] Clarification of the application of the rule did not come about until 1930 as a result of the Ambulance Chasing Investigation. In *Matter of Wilbur*[18] the conduct of the "outside attorney" was found by the Appellate Division to be not censurable although specifically not approvable.[19] The City Court of New York City in the same year set forth in succinct fashion the procedure to be observed in every application for approval of a compromise of an infant's claim. In its decision the court added certain new facts which it required in the infant-plaintiff's affidavit in addition to those covered by Rule 294.[20] It

[14]Matter of Kreizvogel, 228 App. Div. 490, 240 N. Y. Supp. 314 (1st Dep't 1930) (solicitation in one instance and failure to obtain court orders for settlements were also proved). See *supra* note 8.

[15]Matter of Fink, 229 App. Div. 338, 241 N. Y. Supp. 886 (1st Dep't 1930); Matter of Jeromer, 228 App. Div. 123, 239 N. Y. Supp. 304 (1st Dep't 1930); Matter of Goldberg, 227 App. Div. 502, 238 N. Y. Supp. 273 (1st Dep't 1930).

[16]See *supra* note 15.

[17]YEAR BOOK, NEW YORK LAWYERS ASSOCIATION (1921) 127-128. See *supra* note 5.

[18]228 App. Div. 197, 239 N. Y. Supp. 483 (1st Dep't 1930).

[19]Dowling, P. J., observing that bar association committees had not condemned the practice, pointed out, at page 202, that there was no special trust or confidence placed in the "outside attorney" because the relationship between attorney and client was one "on paper" only and not fiduciary.

[20]In Lentine v. Jacobs, 137 Misc. 403, 243 N. Y. Supp. 114 (City Ct. N. Y. 1930), the court, setting forth the nine steps in the procedure for every application for approval of settlement of an infant's claim, states, at page 406: "8. The affidavit of the attorney making the application, in addition to the information required by rule 294 of the Rules

was six years before any other court took an opportunity to discuss the question. In *DeGristina v. Swift & Co.*[21] the New York Supreme Court made it clear that:

> "Defendants or their insurance companies should not be permitted to furnish or even suggest an attorney to carry on the necessary proceedings for the effectuation of settlement agreements that are made through adjusters and parents or others who are supposed to act for the benefit of infants. . . . Under such circumstances the parent should be requested to select his own attorney or, in event of his failure to do so, an application should be made to the court for appointment of an attorney."[22]

Fear was expressed, however, that even this type of procedure would result in perfunctory representation of an infant's rights by an attorney assigned to the case by the court.[23]

The admonition of the First Department of the Appellate Division in the *Wilbur Case* in 1930 was reiterated by the Second Department in *Matter of Paders*[24] involving the same general fact situation. The court pointed out the error of the belief that Rule 294 authorized such practice by the "outside attorney."[25] It was made clear that the purpose of the rule was to advise the court of any interest conflicting with that of the infant and was not intended to encourage the practice. Along with these judicial declarations, special rules were adopted by certain courts to guarantee proper representation of the infant's rights.[26]

Such was the situation up to the year 1939. Need was felt for an amendment to the rule.[27] Accordingly, it was amended[28] but shortly thereafter

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of Civil Practice, shall set forth by whom, on what date and under what terms he was retained; the acts of negligence complained of; the terms of the proposed settlement for personal injuries and loss of services and a brief statement of his reasons for recommending the same; the services rendered by the attorney in the action, and the fee he asks to be allowed. . . ."

[21]158 Misc. 91, 285 N. Y. Supp. 34 (Sup. Ct. 1936).

[22]*Id.* at 93.

[23]Expressed in a speech by New York Supreme Court Justice Heath delivered at the Lawyers' Institute, sponsored by the Federation of Bar Associations of the Sixth Judicial District of New York and the Cornell Law School.

[24]250 App. Div. 418, 294 N. Y. Supp. 252 (2d Dep't 1937).

[25]The position maintained by some attorneys that Rule 294 authorized such practice was due perhaps to a report published in 44 NEW YORK BAR ASSOCIATION REPORTS (1921) 75-79.

[26]Rule 4-C of the Special Rules Regulating the Conduct of Attorneys and Counsellors-at-Law in the First Judicial District. *See also* Horan v. Greig, 12 N. Y. S. (2d) 67 (City Ct. N. Y. 1939).

[27]FOURTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (Leg. Doc. No. 48, 1938) 50-51; FIFTH REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (Leg. Doc. No. 48, 1939) 46-47.

[28]"Application to compromise infants' claims; conflicting interests of infants' attorneys. No attorney having or representing any interest conflicting with that of an infant may represent such infant.

"On any application for the approval by the court of a settlement of a cause of action belonging to an infant, the court shall require the attorney so applying to disclose by affidavit by whom, on what date and under what terms he was retained, the services rendered by him, the fee he asks to be allowed, the acts complained of, the terms of the

a second amendment was made.[29] Thus the rule in its present form became effective January 15, 1940.[30] Its statement is clear and unambiguous. It in effect codifies the decisions under the old 294[31] and derives its provisions from the requirements set forth in *Lentine v. Jacobs*.[32] The added provision allowing the defendant's attorney to draw the papers required for a settlement of an infant's claim is a sensible one. It thus leaves to the court the determination of the reasonableness of the proposed compromise. Knowing that it and it alone is charged with the protection of the infant's rights, the court will probably not dispose of this type of case perfunctorily. In any event, the court will, under the new rule, be made aware of all the important facts. The camouflage of the "friendly suit" will be a thing of the past and the rights of an infant plaintiff will, it is hoped, be given at least unbiased representation.

Robert S. Lesher

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proposed settlement with a brief statement of his reasons for recommending the same; and to state that he has not become concerned in the application or its subject matter at the instance of such defendant directly or indirectly and that he has not received and is not to receive any compensation from such defendant directly or indirectly; and thereupon, if the court or judge deem it necessary, a full examination may be had into all the facts regarding the reasonableness and propriety of such settlement and of the fee which the infant's attorney asks to be allowed."

[29]Adopted January 15, 1940 pursuant to a recommendation in the SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (Leg. Doc. No. 48, 1940) 50-51.

[30]"Rule 294. Application to compromise infants' claims; conflicting interests of infants' attorneys.

"No attorney having or representing any interest conflicting with that of an infant may represent such infant.

"On any application for the approval by the court of a settlement of a cause of action belonging to an infant, if the infant and his guardian are represented by an attorney, the court shall require the attorney to disclose by affidavit by whom, on what date and under what terms he was retained, the services rendered by him, the fee he asks to be allowed, the acts complained of, the terms of the proposed settlement with a brief statement of his reasons for recommending the same; and to state that he has not become concerned in the application or its subject matter at the instance of such defendant directly or indirectly and that he has not received and is not to receive any compensation from such defendant directly or indirectly; and thereupon, if the court or judge deem it necessary, a full examination by the court or judge or by an official referee may be had into all the facts regarding the reasonableness and propriety of such settlement and of the fee which the infant's attorney asks to be allowed.

"If the infant and his guardian are not represented by an attorney, the papers required for the application may be prepared by the attorney for the defendant and shall state that fact, the terms of the proposed settlement and the facts with reference to the cause of action, but such attorney shall make no recommendation in reference to the proposed settlement. The court or judge under such circumstances shall make a full examination into all the facts regarding the reasonableness and propriety of the proposed settlement, and may refer the matter to an official referee for investigation and report thereon.

"Upon the approval of a proposed settlement by the court or judge, an order of settlement or a judgment may be entered without costs."

Along with the affidavit required by this rule, there should be submitted to the court a petition of the guardian *ad litem*, an affidavit of attending physician and the acknowledged consent of the infant if over fourteen years of age.

[31]Matter of Paders, 250 App. Div. 418, 294 N. Y. Supp. 252 (2d Dep't 1937); Matter of Wilbur, 228 App. Div. 197, 239 N. Y. Supp. 483 (1st Dep't 1930); De Gristina v. Swift & Co., 158 Misc. 91, 285 N. Y. Supp. 34 (Sup. Ct. 1936).

[32]137 Misc. 403, 243 N. Y. Supp. 114 (City Ct. N. Y. 1930).

Real Property: Rights of adjoining landowners to percolating waters.—In a recent case, *Rothrauff v. Sinking Springs Water Co., 14 A. (2d) 87 (Pa. Sup. Ct. 1940),* Pennsylvania has professed its allegiance to the doctrine that a landowner may make but a "reasonable use" of the water percolating beneath his property. That the doctrine itself represents the decided weight of authority among the more modern American cases, besides being entirely rational in the light of our more advanced geological knowledge, is not open to question,[1] but in view of the circumstances underlying the instant case, it is at least debatable whether the result here achieved does not constitute a complete misapplication of the fundamental principles upon which the doctrine is based.

Defendant, a corporation engaged in the business of selling water to the public, had a contract to purchase the effluent of a spring situated on plaintiffs' land. Finding that the supply of water received from the spring was inadequate for its needs, defendant secured plaintiffs' permission to sink a well on their land and to pump water therefrom. The increased supply remaining inadequate, defendant took options on adjoining land and sunk several more wells, the last of which produced water in the desired quantity, but permanently stopped the flow of plaintiffs' spring. The court held that the sinking of the last well and the use of the water so obtained for the purpose of sale and distribution was a tortious act for which plaintiffs could have recovered resulting damages at common law, and which, therefore, was a breach of the existing contract as it prevented performance on the part of plaintiffs.[2]

Percolating waters are "those which pass through the ground beneath the surface of the earth without any definite channel, and do not form a part of the body or flow, surface or subterranean, of any watercourse."[3] An early distinction drawn between the law governing natural watercourses and that concerning percolating waters is found in *Acton v. Blundell,*[4] decided by the Exchequer Chamber in 1843, where the court literally applied the maxim, *cuius est solum eius est usque ad caelum et ad inferos* (to whom the soil belongs, he owns also to the sky and to the depths) "whether it [the land below his property] is solid rock, or porous ground, or venous earth, or part soil, part water . . . ,"[5] in favor of the defendant and held that any user of percolating water resulting in a diversion or even a complete appropriation of the supply beneath the land of an adjacent owner was *damnum absque injuria.* This rule was applied by the English courts to an appropriation for commercial sale off the premises[6] and even to a malicious taking.[7]

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[1]Farnham, *Percolating Water and the Common Law* (1913) 19 CASE AND COMMENT 664.

[2]Rothrauff v. Sinking Springs Water Co., 14 A. (2d) 87, 90, 91 (Pa. Sup. Ct. 1940).

[3]BLACK, LAW DICTIONARY (2d ed. 1910).

[4]12 Mees. & W. 324, 152 Eng. Rep. 1223 (1843).

[5]Acton v. Blundell, *supra* note 4, at 353.

[6]Chasemore v. Richards, 7 H. L. Cas. 349 (1859), *aff'g* 2 Hurlst. & N. 168 (Ex. 1859).

[7]Mayor, *etc.* of Bradford v. Pickles, (1895) A. C. 587. *But see* Ballard v. Tomlinson, L. R. 29 Ch. Div. 115 (1885), holding that the rule did not apply to pollution of percolating water.

It was followed in most of the earlier American cases[8] and in several fairly recent ones,[9] although the earlier American decisions seem to have made exceptions in cases of pollution,[10] malicious interception,[11] and waste.[12]

The manifest injustice of the English rule appears to have been first recognized by way of dictum in several New Hampshire cases,[13] and in *Forbell v. City of New York*[14] the American rule of "reasonable user" was actually applied in decision. The court held that it was reasonable for the owner of the soil to use so much of the water as might be necessary for or incidental to the full use and enjoyment of his premises, but that he could not use it for purposes unconnected therewith, if in so doing he should diminish the available supply to an extent that an adjacent owner could not employ his land for its natural and proper purposes. Thus, in New York and other jurisdictions one may presumably appropriate all the available percolating water provided he uses it for agriculture, manufacturing, mining, irrigation or for other purposes connected with the beneficial use of his land[15] and provided he does not waste it.[16] Although the taking of such water for sale off the premises has generally been held to be an "unreasonable use,"[17] it is not unreasonable *per se* under the *Forbell* doctrine, and becomes so only when an adjacent landowner is deprived of the natural enjoyment of his property.[18]

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[8]For collected cases, see 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 746, n. 46; note (1928) 55 A. L. R. 1385.

[9]Nourse v. Andrews, 200 Ky. 467, 255 S. W. 467 (1923); Heninger v. McGinnis, 131 Va. 70, 108 S. E. 671 (1921); Hunte v. Laramie, 26 Wyo. 160, 181 Pac. 137 (1919).

[10]L. A. Wilder, *Correlative Rights in Percolating Waters* (1913) 19 CASE AND COMMENT 677, 668.

[11]See 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 746.

[12]*Ibid.*

[13]Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276 (1870); Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179 (1862).

[14]164 N. Y. 522, 55 N. E. 644 (1900). See also Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141 (2d Dep't 1897).

[15]Sloss-Sheffield Steel & Iron Co. v. Wilkes, 231 Ala. 511, 165 So. 764 (1936); Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (1917); Dunbar v. Sweeney, 230 N. Y. 609, 130 N. E. 913 (1921); Rouse v. City of Kinston, 188 N. C. 1, 123 S. E. 482, 35 A. L. R. 1203, 1222 (1924); Houston & T. C. R.R. v. East, 98 Tex. 146, 81 S. W. 279 (1904); Clinchfield Coal Co. v. Compton, 148 Va. 437, 139 S. E. 308, 55 A. L. R. 1376, 1386 (1927); Evans v. City of Seattle, 182 Wash. 450, 47 P. (2d) 904 (1935).

[16]Nashville, C. & St. L. Ry. v. Rickert, 19 Tenn. App. 446, 89 S. W. (2d) 889 (1935).

[17]Sloss-Sheffield Steel & Iron Co. v. Wilkes, 231 Ala. 511, 165 So. 764 (1936); Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (1917); Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 76 N. E. 849 (1904); Clark County v. Mississippi Lumber Co., 80 Miss. 535, 31 So. 905 (1902); Braidburn Realty Co. v. City of East Orange, 107 N. J. L. 291, 153 Atl. 714 (1931); Meeker v. City of East Orange, 77 N. J. L. 623, 74 Atl. 623 (1909); Dunbar v. Sweeney, 230 N. Y. 609, 130 N. E. 913 (1921); Forbell v. City of New York, 164 N. Y. 522, 55 N. E. 644 (1900); Clinchfield Coal Co. v. Compton, 148 Va. 437, 139 S. E. 308, 55 A. L. R. 1376, 1385 (1927); Evans v. City of Seattle, 182 Wash. 450, 47 P. (2d) 984 (1935); Pence v. Carney, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N.S.) 266 (1902). See also RESTATEMENT, TORTS (1939) § 862, comment (b).

[18]See discussion in Davidson v. City of Ann Arbor, 237 Mich. 453, 212 N. W. 81 (1927); Braidburn Realty Co. v. City of East Orange, *supra* note 17.

Another version of the American doctrine of "reasonable user" is the rule of "correlative rights." While loosely attributed by some courts to the *Forbell* case, this version was in reality established by *Katz v. Walkinshaw*,[19] where the California court held that "the use which any man can make of the water underneath his land must be determined by the needs of all others located over the same reservoir."[20] Under this test, a "reasonable user" is determined primarily by the quantity of water taken, rather than the purpose for which it is employed.[21] Where water was scarce and rainfall uncertain, the sale of percolating water off the premises has been deemed unreasonable,[22] but only where more than an aliquot share was taken.[23]

The Restatement of Torts takes the position that an intentional harm resulting from a diversion of percolating water is unreasonable and wrongful unless the utility of the use outweighs the gravity of the harm,[24] an intentional harm being defined as one where the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from what he is doing.[25] In other words, the Torts Restatement imports into the law of percolating waters the standard of reasonableness which has long been the controlling factor in the general field of nuisances.[26] Both the New York and the California decisions can be viewed as consistent with the Restatement position, which obviously permits the consideration of place of use and proportionate consumption in determining the reasonableness of the diversion. While the harm inflicted by defendant in the instant case would at the outset be classified as unintentional, the harm caused by its continued abstraction of the water after notice of its effect on plaintiffs' spring would seem to be intentional, and lawful only if reasonable.

Long applied in western jurisdictions to watercourses, the rule of "prior appropriation and use" has recently been applied to percolating water by the Utah court in *Wrathall v. Johnson*,[27] where it was held that a prior user of percolating water has a vested right in the amount of his appropriation and any interference therewith by a subsequent appropriator is a wrongful

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[19]141 Cal. 116, 70 Pac. 663 (1902), *aff'd*, 141 Cal. 128, 74 Pac. 766 (1903).

[20]Farnham, *Percolating Water and the Common Law* (1913) 19 CASE AND COMMENT 664, 665. Article XIV, Sec. 3, of the California Constitution (1928), embodies the doctrine of the *Walkinshaw* case. See Peabody v. City of Vallejo, 2 Cal. (2d) 351, 40 P. (2d) 486 (1935).

[21]2 KINNEY, IRRIGATION AND WATER RIGHTS (2d ed. 1918) § 1192. See also Glover v. Utah Oil Refining Company, 62 Utah 174, 218 Pac. 955 (1923); Horne v. Utah Oil Refining Company, 59 Utah 279, 202 Pac. 815 (1921).

[22]Coachella Valley County Water District v. Stevens, 206 Cal. 400, 266 Pac. 341 (1928); Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115 (1910); Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755 (1909); Cohen v. La Canada Land & Water Co., 151 Cal. 680, 91 Pac. 584 (1907); Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372 (1906); Katz v. Walkinshaw, *supra* note 19.

[23]See discussion in Erickson v. Crookston Waterworks, Power & Light Co., 105 Minn. 182, 117 N. W. 435 (1908); Cohen v. La Canada Land & Water Co., *supra* note 22.

[24]RESTATEMENT, TORTS (1939) §§ 860, 861.

[25]*Id.* at §§ 850, comment (a), 859.

[26]*Id.* at §§ 862, 863.

[27]86 Utah 50, 40 P. (2d) 755 (1935). The opinion was written by Moffat, J., Hanson, J., concurring. Straup, C.J., Hansen, J., and Folland, J., concurred on other grounds.

act. This view, while not surprising in a state committed in general to the doctrine of prior appropriation, is of course entirely out of line with both the old and the new common law as to percolating waters.

In reaching its decision in the instant case, the Pennsylvania court expressly approved a line of Pennsylvania cases holding that unlimited appropriation for on-the-premises consumption is lawful,[28] in the absence of malice or negligence.[29] It would appear, therefore, that the court adopted the "purpose criteria" of the *Forbell* case rather than the "quantitative test" of the *Walkinshaw* case, but in applying the doctrine so adopted, it apparently overlooked two important factors: (1) Both plantiffs and defendant were using the water for artificial purposes, *viz.*, selling it off the land; (2) plaintiffs' land was not rendered unfit for its natural enjoyment.[30] Where adjoining landowners are each in the business of extracting and selling water off the premises, it has been held in "purpose criteria" jurisdictions that neither party is liable for the diversion of percolating water "because each is engaged in the exercise of a legal right and the rights of each are equal in the use and enjoyment of the land."[31] By holding that defendant's use was unreasonable, despite the fact that both plaintiffs and defendant were extracting the water for substantially identical purposes, the Pennsylvania court has in reality denied to defendant an equal right in the water table beneath his property. So long as the water table has not been lowered to an extent that plaintiffs are deprived of the natural enjoyment of their land, it is not within the contemplation of the *Forbell* doctrine that defendant be denied the geological advantages of its land.

Moreover, it has been suggested that water used for commercial purposes becomes imbued with the legal attributes of oil and gas.[32] In this field, where all competing users are normally employing or marketing their product off the land, the Pennsylvania courts have steadfastly held that appropriation to the detriment of an adjoining owner is non-actionable.[33]

The conclusion seems inescapable, therefore, that the court has in fact applied the doctrine of "prior appropriation" while paying mere lip service to the New York version of the "reasonable user" rule, and in so doing has achieved a result which is entirely conflicting therewith.

The question remains, however, whether the court's judgment for plaintiffs is sustainable on a purely contract basis. This point will be discussed in a subsequent issue of the QUARTERLY.

Frederick L. Raker

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[28]Williams v. Ladew, 161 Pa. 283, 29 Atl. 54 (1894); Lybe's Appeal, 106 Pa. 626, 51 Am. Rep. 542 (1884); Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93 (1875); Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511 (1863); Wheatley v. Baugh, 25 Pa. 228, 64 Am. Dec. 721 (1855).

[29]Zimmerman v. Union Paving Co., 335 Pa. 319, 6 A. (2d) 901 (1939); Collins v. Chartiers Valley Gas Co., 131 Pa. 143, 18 Atl. 1012 (1890).

[30]While this fact was not adverted to in the opinion, it clearly appears in the paper books submitted by counsel.

[31]Merrick Water Co. v. City of Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 60 (2d Dep't 1898), *aff'd w. o. op.*, 160 N. Y. 657, 55 N. E. 1097 (1899), distinguishing Smith v. City of Brooklyn, *supra* note 14. See also Stillwater Water Co. v. Farmer, 92 Minn. 230, 99 N. W. 882 (1904).

[32]See note (1909) 9 COL. L. REV. 543, 544.

[33]Hamilton v. Foster, 272 Pa. 95, 116 Atl. 50 (1922); Westmoreland Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724 (1889).

Taxation: Constitutional Law: Validity of sales tax by seller state on interstate transaction.—A vital, modern, problem in state sales taxation is presented by the recent New York Court of Appeals decision in *O'Kane v. State of New York, 283 N. Y. 439, 28 N. E. (2d) 905 (1940)*, and its solution, if and when it is determined by the Supreme Court, will do much toward dispelling the area of doubt created by the Court in the *McGoldrick v. Berwind-White Coal Mining Co.* case and related cases.[1]

The *O'Kane* case concerns the constitutionality of a New York sales tax on "all sales and agreements to sell . . . and all deliveries or transfers of stock. . . ."[2] Appellants-complainants are engaged in the securities and investment business with offices in New York City. They agreed as a result of negotiations *via* mail, telephone, and telegraph to sell a certain number of shares of stock to two customer firms, one in Philadelphia, and the other in Washington, D. C. The customer firms mailed confirmations to the New York seller firms which in turn mailed confirmations of the sale to the purchasers. The securities themselves were mailed by appellants to banks in Philadelphia and Washington for delivery upon payment of sight drafts attached to the certificates. The New York Court of Appeals in a 4-3 decision upheld the tax, and, relying heavily upon the *Berwind-White* decision, rejected the proposals that the tax discriminated against interstate commerce and that it subjected interstate commerce to the risk of cumulative taxes. Lehman, Ch. J., dissenting, and Loughran and Conway, JJ., maintained that the stock transfer tax, being on the seller and not the buyer, was dissimilar to the sales tax in the *Berwind-White* case (where the tax was held analogous to a use tax), and that it *did* impose upon interstate commerce the possibility of "multiple burdens," absent in the *Berwind-White* case, which "might impede or destroy such commerce."[3]

The history of the validity of state taxation upon interstate activity discloses a definite swing in the judicial pendulum away from the Supreme Court's interpretation of the Commerce Clause in 1887 to the effect that "Interstate commerce cannot be taxed at all, even though the same amount of the tax is laid on domestic commerce,"[4] towards the quite contrary proposi-

[1]McGoldrick v. Berwind-White Coal Mining Company, 60 Sup. Ct. 388 (U. S. 1940); McGoldrick v. Felt & Tarrant Manufacturing Company, 60 Sup. Ct. 404 (U. S. 1940); McGoldrick v. A. H. DuGrenier, Inc., 60 Sup. Ct. 404 (U. S. 1940).

[2]N. Y. TAX LAW §§ 270, 270-a.

[3]283 N. Y. 439, 453, 28 N. E. (2d) 905 (1940).

[4]This doctrine of universal immunity of interstate sales originated in Robbins v. Shelby County Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592 (1887), but a series of decisions thereafter modified this broad holding and thereby enlarged the taxing area available to the states. In Banker Brothers v. Pennsylvania, 222 U. S. 210, 32 Sup. Ct. 38 (1911), the court sustained a Pennsylvania sales tax upon the sale of an auto, ordered from an extrastate manufacturer, by a local dealer to a local customer. The Court held such a sale to be *intrastate* commerce, in effect limiting the *Robbins* case immunity to sales negotiated within the state of the buyer by extrastate vendors or their agents. *Accord*, Graybar Electric Company v. Curry, 238 Ala. 116, 189 So. 186 (1939), *aff'd per curiam*, 308 U. S. 513, 60 Sup. Ct. 139 (1939).

The whittling process was further effectuated by Gregg Dyeing Company v. Query, 286 U. S. 472, 52 Sup. Ct. 631 (1931), the Court there sustaining a storage tax on all oil transported from extrastate sources, though the tax was clearly to offset the burden carried by intrastate oil sales in the form of a local use tax. Three years later the non-

tion stated by Mr. Justice Holmes in 1932 that "Interstate commerce must pay its way"[5] and that it must contribute its fair share to the state tax burdens.[6] In the three recent decisions of *Western Live Stock v. Bureau of Revenue*,[7] *Adams Manufacturing Company v. Storen*,[8] and *Gwin, White, and Prince Company v. Henneford*,[9] the Supreme Court has attempted to solve the problem of how to require interstate commerce to compensate the states for the protection and convenience of their laws and agencies without subjecting such commerce to either discrimination or cumulative tax burdens from which intrastate transactions are free. The result of these three decisions has been the promulgation of a new criterion to guide the Court. Commentators have since labeled it the "multiple burden doctrine."

The *Adams* case clearly establishes what the Court has in mind when it speaks of multiple burdens. There, the appellant-complainant manufactured certain machinery in Indiana, having its home office in that state. Eighty percent of its goods were sold to customers outside the state. Orders were taken by agents in other states, subject to home office approval, and payments were remitted to the home office. The Court found the Indiana Gross Income Tax Act of 1933 to be a tax of 1% upon the gross receipts from appellant's sales, both local and interstate (rather than a charter fee, or franchise tax, or an excise upon the privilege of manufacturing, or a property tax), and held it invalid, saying: "The vice of the Statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid *to the fullest extent by States in which the goods are sold as well as those in which they are manufactured.* Interstate commerce would thus be subjected to the risk of a double burden to which intrastate commerce is not exposed. . . . "[10] (Italics supplied.)

To illustrate: Suppose that a piece of machinery is manufactured in state *X* at the cost of $200, and is retailed in state *Y* for $400. The extra margin of $200 consists of $100 net profit and $100 added cost incurred because of expenditures in state *Y* (advertising, distribution, delivery, local staff, *etc.*). If state *X* were permitted to tax the entire $400 and were not restricted to the taxation of that portion of the gross receipts which could be traced to

taxable field was more clearly circumscribed in Wiloil Corporation v. Pennsylvania, 294 U. S. 169, 55 Sup. Ct. 358 (1934), the decision there holding that a sales tax was invalid where interstate commerce was not "required or contemplated" by the contract of sale.

[5]New Jersey Telephone Company v. Tax Board, 280 U. S. 338, 351, 50 Sup. Ct. 111 (1929).

[6]For excellent, full discussion of the general problem of state taxation and its conflict with the Commerce Clause, U. S. CONST. Art. I, § 8, see Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617; Lockhart, *State Barriers to Interstate Trade* (1940) 53 HARV. L. REV. 1284; Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the State* (1918) 31 HARV. L. REV. 321, 572, 932, (1919) 32 HARV. L. REV. 234, 374, 634, 902, esp. 374-416; Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909; Warren and Shlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49.

[7]303 U. S. 250, 58 Sup. Ct. 546, 115 A. L. R. 944, 952 (1937).

[8]304 U. S. 307, 58 Sup. Ct. 913, 117 A. L. R. 429, 444 (1938).

[9]305 U. S. 434, 59 Sup. Ct. 325 (1938).

[10]304 U. S. 307, 311, 58 Sup. Ct. 913 (1938).

activities within X's state boundaries, state Y could likewise tax the same $400 sale since part of this resulted from transactions within Y's jurisdiction. In consequence, the interstate sale of a machine from the home office to Y state would be subjected to the risk of duplicate sales taxes or "multiple burdens" while the sale of the same machine to a local buyer in state X would need absorb but one tax.

The *Berwind-White* decision, handed down at the last term (1940) of the Court has puzzled students in the general field because the multiple burden doctrine was not applied despite the fact that Mr. Justice Stone, who first enunciated the theory, wrote the majority opinion.[11] By employing the "local event" yardstick, and thereby permitting the segregation of the act of delivering the goods as a "local event," and by stressing that the nature of the sales tax involved was analogous to a use tax, the Court was able theoretically to circumvent the multiple burden doctrine. But actually, as pointed out by Hughes, Ch. J., in writing for the dissent, the threat of cumulative taxation was as much present in the *Berwind-White* sales tax case as in the gross receipts cases.[12]

It is submitted that one can resolve the seeming conflict in the decision of these two classes of cases by recognizing that the *Berwind-White* decision possibly rests on practical and economic considerations[13] which are more concerned with achieving a uniform system of state sales taxation throughout the Union, and which are less theoretical and mechanical than those underlying the multiple burden doctrine. For it has become increasingly evident to the Court that it is difficult for each state to determine accurate apportionment mathematically or otherwise,[14] and the states are never sure that their allocation formulae will be acceptable to the Court.

By placing its stamp of approval on a buyer's state tax despite the potential threat of duplicate taxes,[15] the Court may be intending to correct such impediments to the smooth functioning of our state taxing systems, and at

[11]See Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909; Lockhart, *State Tax Barriers to Interstate Trade* (1940) 53 HARV. L. REV. 1284; notes (1940) 25 CORNELL L. Q. 422; (1940) 34 BROOKLYN L. REV. 329; (1940) 9 FORD. L. REV. 244; (1940) 15 IND. L. REV. 318; (1940) 17 N. Y. U. L. Q. REV. 459; (1940) 88 U. OF PA. L. REV. 752.

[12]There is language in the *Berwind-White* case to the effect that *either* transfer of title *or* possession is a sufficient basis for the tax [60 Sup. Ct. 388, 391 (1940)]: "the tax is conditional upon events occurring within the state, either transfer of title or possession of the purchased property." This would mean that in cases like *McGoldrick v. Felt and Tarrant Manufacturing Company*, and *McGoldrick v. A. H. DuGrenier, Inc.*, the same sale might be taxed by *both* New York and Illinois (or Massachusetts in the latter case) because while the delivery was in New York, the agreement was subject to home office approval. Likewise, the minority in the *Berwind-White* case points out that if New York can tax the delivery, Pennsylvania can tax the shipment, and New Jersey the transshipment, thereby creating multiple taxation. [60 Sup. Ct. 388, 403 (1940)].

[13]"We are unable to say that the present tax . . . subjects the commerce involved . . . to any greater burden . . . in any *economic or practical* way, whether the purchase order or the contract precedes or follows the interstate shipment." McGoldrick v. Berwind-White Coal Mining Co., 60 Sup. Ct. 388, 396 (1940) (minority opinion).

[14]Chertoff, *Some Federal Constitutional Limitations Upon State Business Taxes on Multi-State Enterprises* (1940) 6 U. OF PITT. L. REV. 249.

[15]See *supra* note 8.

the same time erase the possibility of multiple taxation. For the tax by the buyer state does not unduly burden interstate commerce since all sales in the buyer state, both local and interstate, absorb the same tax—one pays no less than the other.[16] The opinion in the *Berwind-White* case is silent as to seller state taxes and no hint is there given as to whether they will be upheld. But it is clear that if the policy here suggested is the real one underlying the decision, the Court would necessarily be required to invalidate any *seller* state sales tax such as that of the principle case. A tax by the state of origin opens wide the doors of cumulative taxation in that those goods transported from the seller state would be placed at a disadvantage alongside local goods in those states which levied no sales tax.[17] And even if the buyer state did levy a sales tax on all goods, including local merchandise, in cases like the instant one the interstate sale would be burdened by *two* sales taxes—one in the seller and one in the buyer state—while the local sale would need absorb but one, a manifestly unfair situation.

From another viewpoint one can likewise reconcile the gross receipts cases with the *Berwind-White* decision by observing that the Court in passing upon sales tax cases, apparently dispenses entirely with the test of whether there is a "risk" of potential multiple burdens and employs a more practical approach.[18] That is, the Court will invalidate a sales or use tax *only when* the complainant has established that the transaction involved has *actually* been burdened by the duplicate taxation of two or more states. Unless this is

[16]This approach to the problem of sales taxes as interstate transactions was originally discussed in Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617, published before the *Berwind-White* decision. The fact that the majority cited the article strengthens the possibility that reasoning similar to Lockhart's forms the foundation of the *Berwind-White* decision. That this may have been the case is hinted by the following language of the minority opinion [60 Sup. Ct. 388, 404 (1940)]: "Doubtless much can be said as to the desirability of a comprehensive system of taxation. . . . However important such a policy may be, it is not a matter for this Court."

The *Felt & Tarrant* and *Du Grenier* cases, decided on the same day as the *Berwind-White* case, and resting solely upon the latter decision, are strong evidence that the Court *is* striving to formulate a uniform system of state sales taxation by limiting sales taxes to buyer states, for those cases presented wide-open possibilities of taxation by the seller state. See *supra* note 8. Such a new standard of uniformity would not only not interfere with but also would actually apply the apportionment theory of the gross receipts tax doctrine, since the buyer state would be levying a tax on a selling activity, whether interstate or local, *within* its borders, thereby apportioning its income to transactions within its jurisdiction, whereas the seller state would be prohibited from possibly taxing the same sale in the state of origin.

[17]At the height of the depression 22 states had not as yet adopted sales taxes. See note (1939) 24 CORNELL L. Q. 248.

[18]"A state, for many purposes is to be reckoned as a self-contained unit which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power there is no need to mark them now. *It will be time enough to mark them when* the taxpayer, paying in the state of origin is compelled again to pay in the state of destination." Cardozo, J., in Henneford v. Silas Mason Company, 300 U. S. 577, 587, 57 Sup. Ct. 524 (1936). (Italics supplied.) See also Southern Pacific Company v. Gallagher, 306 U. S. 167, 170, 50 Sup. Ct. 389 (1938).

Compare this language with that in Gwin, White, and Prince Company v. Henneford, 305 U. S. 434, 440, 59 Sup. Ct. 325 (1938): "Unlawfulness of the burden depends upon its nature measured in terms of its *capacity* to obstruct interstate commerce, and not on the contingency that some other state may have subjected the commerce to a like burden." (Italics supplied.)

shown, the Court will restrict itself entirely to the inquiry of whether the tax is discriminatory, *i.e.*, whether it is applied alike to intrastate and interstate commerce.[19] It may be expected, therefore, that the decision in *O'Kane v. State of New York* will be upheld, and the "risk" test so much relied upon by the minority[20] will not be resorted to as an index, since no proof of a duplicate levy is made in the case. If the delivery in the *Berwind-White* case was regarded as a local event, despite its being an integral part of the interstate transaction, it is difficult to conceive why the agreement or sale in the *O'Kane* case cannot be similarly labeled. And the analogy of the use tax, if necessary at all, is only slightly more adaptable in the *Berwind-White* situation than in the principal case, since in neither one has the interstate activity come to an end—a necessary requisite of any valid use tax.[21]

The final determination of the validity of a seller state sales tax such as that of the principal case, may, in the last analysis, depend on the personnel of the Court itself. For three justices—Black, Frankfurter, and Douglas (Mr. Justice Black particularly in his dissenting opinions in the *Adams* and *Gwin* cases)—have indicated that the Court should concern itself only with the question of actual discrimination by a state tax and that the solution of the problem of multiple taxation, either existing or potential, is solely within the province of Congress.[22] Inasmuch as the tax of the principal case is clearly non-discriminatory, it may well be that Justices Black, Frankfurter, and Douglas will again join with Justices Stone and Reed, the five constituting a majority in favor of the tax. And although the latter two justices are primarily concerned with the prevention of actual duplicate burdens, their previous commitments are broad enough to permit their endorsement of the position taken by Justices Black, Frankfurter, and Douglas. The underlying policy of such a majority, therefore, may quite possibly be that in the absence of discrimination and federal legislation restricting state taxation of interstate transactions, the Court will not disturb the existing tax structure of a state by invalidating any of its sales tax enactments.

The foregoing analysis serves to illustrate that many questions bearing on modern sales taxation have been left unanswered by the *Berwind-White* decision. It seems clear that in a good many cases the answers will hinge upon the approach which the Court chooses from among the several herein discussed.

LOUIS POLLACK

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[19]The *Felt and Tarrant* and *Du Grenier* cases, in both of which the Court ignored the "risk" test of the *Adams* and *Gwin* cases, illustrate that, in the absence of definite proof of cumulative taxation, the courts in such sales cases will look only to the tax set-up in the state whose tax is being challenged. See *supra* note 8. See also Johnson, *Multi-State Taxation of Interstate Sales* (1938) 27 CALIF. L. REV. 549, 557.

[20]283 N. Y. 439, 450, 28 N. E. (2d) 905 (1940).

[21]See Henneford v. Silas Mason Company, and Southern Pacific v. Gallagher, both cited *supra* note 18. See also the minority opinion in the *Berwind-White* case [60 Sup. Ct. 388, 402 (1940)]: ". . . delivery in completion of the sale is as properly immune from state taxation as is the transportation to the purchaser's dock."

[22]" . . . it would seem that only Congress has the power to formulate rules . . . to protect interstate commerce from *merely possible future unfair burdens*. . . . [By invalidating the Indiana Gross Receipts Tax of 1933] an unjust and unfair burden is actually imposed upon intrastate business because of an apprehension of a possible future injury to interstate commerce." Dissenting opinion of Mr. Justice Black in Adams Manufacturing Co. v. Storen, 304 U. S. 307, 328, 58 Sup. Ct. 913 (1938).

Torts: Nuisance: Contributory negligence as defense.—Plaintiff tripped over a board which covered a pipe running from an air compressor in the street across the sidewalk to an excavation project of the defendant. A permit had been obtained for the laying of the pipe. Plaintiff alleged that the obstruction constituted negligence and nuisance. Defendant pleaded contributory negligence. *Held:* This would be a valid defense either as to negligence or as to nuisance arising out of negligence. *Delaney* et al. *v. Philhern Realty Co.* et al., *280 N. Y. 461, 21 N. E. (2d) 507 (1939).*[1]

There are two kinds of nuisance—public and private.[2] Public nuisance may be defined as a more or less continuous and substantial interference with the health, comfort, safety, or right of passage on land or water of the public generally.[3] Private nuisance is a more or less continuous and substantial invasion of a specific person's lawful use or enjoyment of his land.[4] This note has no bearing upon the public nuisance, except insofar as a private individual can show that the public nuisance was to him a private nuisance, inflicting upon him a particular and substantial injury. This type of private nuisance is often called absolute nuisance, or nuisance *per se:* the defendant is held absolutely because of the danger or inconvenience he has created or because his actions are deemed to be nuisance by statute, without regard to any intent or foreseeability on his part. There is another kind of private nuisance appearing in our law: that which might be called a "quasi-nuisance." This "quasi-nuisance" comprises any other substantial disturbance or interference with a person's health, comfort, safety, or right of passage on land or water which arises from and is dependent upon negligence, trespass, or an intentional act, designated by the courts as "nuisance" for the purpose of imposing positive liability upon the wrongdoer.

With these conceptions of nuisance before us, let us consider the possible applications of the defense of contributory negligence in a "nuisance" action. One view is that contributory negligence is not a bar to a nuisance action, whatever the nuisance may be.[5] Thus, by the device of labeling the wrong a nuisance, the defendant is held absolutely. The antithesis of this view is the broad rule that contributory negligence may be pleaded as a defense in *all* actions of nuisance.[6] This is the equivalent of always treating nuisance

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[1]This case was briefly noted in (1939) 18 TEX. L. REV. 103. For a general note, see *Contributory Negligence as a Defense to Nuisance* (1934) 29 ILL. L. REV. 372.

[2]In general, see HARPER, TORTS (1933) §§ 179-181; JOYCE, NUISANCES (1906) chs. I, II; PEARCE AND MESTON, NUISANCES (1926) ch. I; Winfield, *Nuisance as a Tort* (1931) 4 CAMB. L. J. 189.

[3]This definition is substantially that offered in PEARCE AND MESTON, *op. cit. supra* note 2, at 7. Public nuisance is a field all by itself. It is, if possible, more intangible and all-inclusive than private nuisance. The chief distinguishing feature, of course, is an offense against the public.

[4]This definition is substantially that offered in Winfield, *supra* note 2, at 190. This is the traditional private nuisance, as evolved since the days of Blackstone (3 BL. COMM. *216), with none of the later ramifications that make "nuisance" a catch-all phrase.

[5]The following cases take this view, but it is to be noted that in all the nuisance complained of was a traditional land nuisance: Watson v. New Milford, 72 Conn. 561, 45 Atl. 167 (1900); Bowmann v. Humphrey, 132 Iowa 234, 109 N. W. 714 (1906); Baker v. City of Wheeling *et al.*, 117 W. Va. 362, 185 S. E. 842 (1936).

[6]The following cases take this view: Curtis v. Kastner, 220 Cal. 185, 30 P. (2d) 26

as negligence so far as the defense of contributory negligence is concerned. A third, and intermediate, theory is that stated in *McFarlane v. City of Niagara Falls.*[7] There, in a situation similar to the one in the instant case, Chief Judge Cardozo, speaking for the New York Court of Appeals, ruled that contributory negligence would be a defense to a nuisance arising out of negligence, but that for absolute nuisance "something more than a mere want of ordinary care on the part of the plaintiff is required to prevent recovery."[8] In *Drake v. Corning Building Co.,* [9] this rule was applied to a controversy where defendant permitted a weighing machine to remain in front of his store in violation of the city charter, and plaintiff tripped over it. The court allowed the defense of contributory negligence to be raised, saying that the *continuance* of the nuisance amounted to negligence.

The distinctions between nuisance and negligence are often difficult to draw;[10] in fact, one English author would obliterate them, grouping "Negli-

(1934), criticized (1935) 19 MINN. L. REV. 249; Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326 (1856) (dictum); McKenna v. Andreassi, 292 Mass. 213, 197 N. E. 879 (1935); Smith v. Smith, 2 Pick. 621, 13 Am. Dec. 464 (Mass. 1824) (in both Massachusetts cases, the rule is restricted to unlawful obstructions in the highway); Delaney v. Philhern Realty Co., 280 N. Y. 461, 21 N. E. (2d) 507 (1939) (concurring opinion of Crane, J.).

[7]247 N. Y. 340, 347, 160 N. E. 391, 57 A. L. R. 1, 7 (1928), noted (1928) 6 N. Y. U. L. Q. REV. 82, (1928) 2 ST. JOHN'S L. REV. 233. In that case, plaintiff tripped over ridge on the city sidewalk. The trial judge found that as a nuisance existed any contributory negligence on the part of the plaintiff was immaterial. *Held:* This was error; "where the substance of the wrong is negligence, a plaintiff, though pleading nuisance, is under a duty to show care [on his part] proportioned to the danger." The case was remanded to determine whether plaintiff was contributorily negligent. For prior New York decisions leading up to the *McFarlane* case, see Congreve v. Smith, 18 N. Y. 79 (1858) (excavation in street held to be nuisance and plaintiff allowed to recover, there being no lack of due care on his part to avoid the injury); Muller v. McKesson *et al.,* 73 N. Y. 195 (1878) (liability for keeping ferocious watch-dog held absolute, and plaintiff allowed to recover in absence of showing that he voluntarily brought injury upon himself); Clifford v. Dam, 81 N. Y. 52 (1880) (plaintiff allowed to recover for injury caused by falling through defendant's iron covering in sidewalk in the absence of showing that he voluntarily jumped into the hole). For cases using the same principle as the *McFarlane* case, see Hill v. Way, 117 Conn. 359, 168 Atl. 1 (1933), noted (1933) 1 DUKE B. A. J. 67, (1933) 11 N. Y. U. L. Q. REV. 482; Hoffman v. City of Bristol, 113 Conn. 386, 155 Atl. 499 (1931); Hammond v. Monmouth County, 117 N. J. L. 11, 186 Atl. 482 (Sup. Ct. 1936), noted (1937) 35 MICH. L. REV. 684; Thompson v. Petrozzello *et al.,* 5 N. J. Misc. 645, 137 Atl. 835 (Sup. Ct. 1927).

[8]Delaney *et al.* v. Philhern Realty Co. *et al.,* 280 N. Y. 461, 465, 21 N. E. (2d) 507 (1939). This case is a reaffirmance of the *McFarlane* case. See *supra* note 7.

[9]241 App. Div. 586, 272 N. Y. Supp. 726 (4th Dep't 1934).

[10]*E.g.,* see Hogle v. H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910), where defendant's continued negligence in failing to use reasonable care to prevent its workmen from throwing pieces of iron from factory windows onto plaintiff's property was held to be equivalent to a nuisance. In this case the court, at page 393, made the following significant statement: "The line between protracted and habitual negligence and nuisance is not easily drawn, and facts may exist which call for damages on either theory when the pleadings are appropriate, as this case, to either kind of relief." See also Weston v. Troy, 139 N. Y. 281 (1893) (situation similar to the *McFarlane* case, except that the plaintiff tripped over a ridge of ice; offense was held to be negligence and plaintiff was required to show freedom from contributory negligence); Winfield, *Nuisance as a Tort* (1931) 4 CAMB. L. J. 189, 197; Winfield, *The History of Negligence in the Law of Torts* (1926) 42 L. Q. REV. 184; note (1915) 1 CORNELL L. Q. 55,

gence, Trespass on and off the highway, statutory duties, Nuisance . . . under a common formula."[11] There being this overlapping, to hold arbitrarily that contributory negligence is never a defense in a nuisance action works hardship in those cases of "quasi-nuisance" springing from continuing negligence; in such cases, the defendant's liability would depend solely upon the theory of the action brought by the plaintiff.[12] Likewise, to hold strictly that contributory negligence is always a defense in a nuisance action raises difficulties when the nuisance is a traditional private nuisance, or is a nuisance resulting from an intentional act or trespass. The first theory (that contributory negligence is not a defense) is properly applicable to the absolute private nuisance; the second theory (that contributory negligence is a defense) is proper in those nuisance actions which in their essence are based on negligence. The formula set forth by Judge Cardozo in the *McFarlane* case, therefore, adopts a fair and equitable mean between the above opposing extremes. Thus, to defeat his recovery in an absolute nuisance action, plaintiff's fault must be practically an assumption of the risk. In "quasi-nuisances" which arise from negligence, contributory negligence may be a valid defense. But whether the condition be labeled an "absolute" nuisance or a "quasi-nuisance" the court should apply a flexible standard of contributory fault, measured by "a duty (on the part of the plaintiff) of reasonable vigilance in proportion to the risk,"[13] which duty must depend on the facts presented in each case.

The *Delaney* case and the *Drake* case show the application of Judge Cardozo's rule of the *McFarlane* case in two different situations: in the former the negligence amounted to a nuisance, and in the latter the continuation of the nuisance constituted negligence. It seems desirable that such a distinction be made, for the reason that a specific instruction to the jury as to the defense of contributory negligence in a case where the nuisance merges into negligence is more effective than a general instruction as to the defense in a case where the negligence gives rise to nuisance.

Frederick L. Turner

Trusts: Effect of exculpatory clause.—Exculpatory clauses in wills and trust deeds are not new elements in the law of trusts.[1] Such clauses are in-

(1937) 21 MINN. L. REV. 755. It is to be noted that in one of the earliest cases allowing the defense of contributory negligence [Butterfield v. Forrester, 11 East 60 (K. B. 1809)], the defendant's wrong, that of placing an obstruction in the highway, could be treated either as nuisance or as negligence.

[11]Friedman, *Nuisance, Negligence and the Overlapping of the Torts* (1940) 3 MOD. L. REV. 305, 309.

[12]Hogle v. H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910). See *supra* note 10.

[13]McFarlane v. City of Niagara Falls, 247 N. Y. 340, 350, 160 N. E. 391 (1928).

[1]Pride v. Fooks, 2 Beav. 430 (Ch. 1839); Mucklow v. Fuller (Ch. 1821) Jac. 198, 37 Eng. Rep. 824; Dawson v. Clarke, 18 Ves. 247 (Ch. 1810); Bartlett v. Hodgson, 1 T. R. 43, 99 Eng. Rep. 962 (Ch. 1785).

serted by settlors and testators for the purpose of limiting the liability of the trustee for acts done in relation to the trust. The decisions have not been in agreement as to the interpretation and legal effect of these clauses.[2] In *Matter of Rushmore's Estate, 21 N. Y. S. (2d) 526 (Surr. Ct. 1940)*, the trustees of a testamentary trust claimed in an accounting proceeding that the construction of the following exculpatory clause in the testator's will gave them the power to invest trust funds in non-legal securities without liability for resulting losses: "I direct that neither my executors nor my trustees shall be held in any way liable for any act done or suffered to be done, thereunder, and I direct neither of my executors nor trustees shall be held responsible for the acts or defaults of the other." The Surrogate held that the language in the will did not confer the power claimed by the trustees in the absence of an express direction by the testator; that the true legal effect of the clause was not to enlarge the powers of the trustees but to limit their liabilities for acts done in good faith within the powers granted expressly by the will; that they could not hold for any unreasonable length of time the non-legal securities received by them from the decedent, nor could they make new investments in non-legals.

The decision by the Surrogate in giving the clause this legal effect as to investment in non-legal securities[3] is amply supported by authority, but the interpretation of the clause as to possible future claims by the trustees remains an open question. In the light of past cases, the interpretation of the clause cannot be foretold.[4]

That a settlor or testator may declare that the trustee shall have administrative powers and freedom from liability beyond that implied by a court of equity is too well settled to admit of doubt.[5] But public policy has placed a limit on the extent to which immunity from liability can be granted to a trustee since equity regards the beneficiary with a favored eye and will not permit gross negligence or bad faith in the administration of the trust.[6] The

[2]Connover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 Atl. 844 (Ch. 1917), *aff'd*, 89 N. J. Eq. 584, 106 Atl. 890 (1918); Crabb v. Young, 92 N. Y. 56 (1883). Compare *In re* Jarvis' Estate, 110 Misc. 5, 180 N. Y. Supp. 324 (Surr. Ct. 1920) with Tuttle v. Gilmore, 36 N. J. Eq. 617, 3 Atl. 267 (1882), and with Wilkins v. Hogg, 31 L. J. 41 (Ch. 1861).

[3]Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381 (1909); Connover v. Guarantee Trust Co., *supra* note 2; Matter of Mallon, 43 Misc. 569, 89 N. Y. Supp. 23 (Surr. Ct. 1904), *aff'd sub nom.* Matter of Howard, 110 App. Div. 61, 97 N. Y. Supp. 23 (2d Dep't 1905), *aff'd mem.*, 185 N. Y. 539, 77 N. E. 1189 (1905); 2 SCOTT, TRUSTS (2d ed. 1939) § 222.1.

[4]3 BOGERT, TRUSTS AND TRUSTEES (1935) § 542; 2 SCOTT, *op. cit. supra* note 3, § 222.2.

[5]Thompson v. Hays, 11 F. (2d) 244 (C. C. A. 8th 1926); *In re* Leupp, 108 N. J. Eq. 49, 153 Atl. 842 (1931); Matter of Clark, 257 N. Y. 132, 177 N. E. 397 (1931), 77 A. L. R. 499, 505 (1932); Matter of Kramer's Estate, 172 Misc. 598, 15 N. Y. S. (2d) 700 (Surr. Ct. 1939); Matter of Olmstead, 30 Misc. 350, 63 N. Y. Supp. 489 (Surr. Ct. 1900), *mod.*, 52 App. Div. 515, 66 N. Y. Supp. 212 (1st Dep't 1900), *aff'd*, 164 N. Y. 571, 58 N. E. 1090 (1901); North Adams National Bank v. Curtiss, 279 Mass. 471, 180 N. E. 217, 83 A. L. R. 606, 616 (1932); Merrell's Estate, 26 Pa. Dist. 323 (1916). *Contra:* Litchfield v. White, 7 N. Y. 438 (1852).

[6]Browning v. Fidelity Trust Co., 250 Fed. 231 (C. C. A. 3d 1918), *cert. denied*, 248 U. S. 564, 39 Sup. Ct. 9 (1919); Corbett v. Benioff, 126 Cal. App. 772, 14 P. (2d) 1028 (1932); Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919); *In re* Andrus' Will, 156 Misc. 268, 281 N. Y. Supp. 831 (Surr. Ct. 1935), noted (1936) 20 MINN.

settlor is not permitted to grant the trustee absolute freedom from duty and liability to the *cestui que trust* since this would encourage undesirable conduct and defeat the purpose of the trust. No cases found have immunity clauses which purport to give such exoneration from liability. Typical exculpatory clauses exempt the trustee from liability for depreciation of securities,[7] retention of securities,[8] mistakes,[9] errors in judgment,[10] defalcations of a co-trustee,[11] and acts in reference to the trust other than bad faith,[12] gross negligence[13] or wilful default.[14] No matter how broad the provisions of an immunity clause, the trustee will be liable if he intentionally or wilfully exceeds his trust powers,[15] or acts with reckless indifference to the interests of the beneficiary, or if he has personally profited through a breach of trust.[16] Nor can the clause be given effect if it is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary or confidential relation to the settlor.[17]

English courts have given only limited effect to exculpatory clauses either by strictly construing them[18] or giving them no legal effect whatsoever.[19] An early case stated that the exculpatory clause gave no more protection than a court of equity would give in the absence of such a clause, and that such a clause was infused in every will by implication.[20] The English decisions agree

L. REV. 210, (1936) 22 VA. L. REV. 475; N. Y. DECEDENT ESTATE LAW § 125; 2 SCOTT, *op. cit. supra* note 3, § 222.3; 3 BOGERT, *op. cit. supra* note 4, § 542.

[7]*In re* Carnell's Will, 21 N. Y. S. (2d) 376 (1940); Drosier v. Brerton, 15 Beav. 221, 51 Eng. Rep. 521 (Ch. 1851).

[8]Matter of Clark, *supra* note 5; Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925).

[9]North Adams National Bank v. Curtiss, *supra* note 5.

[10]*In re* Carnell's Will, *supra* note 7; Knox v. Mackinnon, 13 App. Cas. 753 (1888).

[11]Warren v. Pazolt, *supra* note 3; Pass v. Dundas, 43 L. T. 665 (Ch. 1889); Brumridge v. Brumridge, 27 Beav. 5 (Ch. 1858).

[12]Digney v. Blanchard, 226 Mass. 335, 115 N. E. 424 (1917); Woodruff v. Freehold Trust Co., 112 N. J. Eq. 405, 164 Atl. 411 (1933).

[13]Tuttle v. Gilmore, 36 N. J. Eq. 617, 3 Atl. 267 (1882); April v. April, 272 N. Y. 331, 6 N. E. (2d) 43 (1936); Matter of Mallon, *supra* note 3.

[14]Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930); *In re* Jarvis' Estate, 110 Misc. 5, 180 N. Y. Supp. 324 (Surr. Ct. 1920); Matter of Olmstead, *supra* note 5.

[15]Corbett v. Benioff, 126 Cal. App. 772, 14 P. (2d) 1028 (1932); Digney v. Blanchard, 226 Mass. 335, 115 N. E. 424 (1917); Connover v. Guarantee Trust Co., *supra* note 2; Tuttle v. Gilmore, 36 N. J. Eq. 617, 3 Atl. 267 (1882); Crabb v. Young, 92 N. Y. 56 (1883); Matter of Mallon, *supra* note 3; Rae v. Meek, 14 App. Cas. 558 (1889); Chapman v. Broune, (1902) 1 Ch. 785; Brumridge v. Brumridge, 27 Beav. 5 (Ch. 1858).

[16]*In re* Andrus' Will, 156 Misc. 268, 281 N. Y. Supp. 831 (Surr. Ct. 1935), noted (1936) 20 MINN. L. REV. 210, (1936) 22 VA L. REV. 475; RESTATEMENT, TRUSTS (1935) § 222 (1).

[17]RESTATEMENT, TRUSTS (1935) § 222 (2).

[18]Drosier v. Brerton, 15 Beav. 221, 51 Eng. Rep. 521 (Ch. 1851) (holding that a clause releasing liability for decrease in value of securities did not apply to money lent on a second mortgage); Dix v. Burford, 19 Beav. 409, 52 Eng. Rep. 408 (Ch. 1854) (where exculpatory clause said no liability for losses in handling funds but court held trustee liable for defalcations of co-trustee); Brumridge v. Brumridge, 27 Beav. 5 (Ch. 1858); Rae v. Meek, 14 App. Cas. 558 (1889).

[19]Dawson v. Clarke, 18 Ves. 247 (Ch. 1858); Rehden v. Wesley, 29 Beav. 213, 54 Eng. Rep. 609 (Ch. 1861); Pride v. Fooks, 2 Beav. 430 (Ch. 1839); Bartlett v. Hodgson, 1 T. R. 42 (Ch. 1785); LEWIN, TRUSTS (13th ed. 1928) 249.

[20]Dawson v. Clarke, *supra* note 19.

that an immunity clause affords no protection for gross negligence,[21] positive breaches of duty,[22] known misapplication by co-trustee,[23] or wilful default and bad faith.[24] The two most extreme English cases hold that the ordinary equity rules covering the liability of a trustee were superseded by a broad immunity clause which was construed to protect the trustees who had committed positive breaches of trust and had given complete management of funds to a co-trustee who had embezzled and misapplied them.[25] Because of the strictness of the decisions, statutes were passed in 1861, 1896, and 1925. The English Trustee Act of 1925 provides statutory immunity in a large number of cases and gives the court power to excuse the trustee from liability for breach of trust, where he has acted "honestly and reasonably."[26] These statutes have been liberally construed.[27]

American courts have used varying interpretations when dealing with exculpatory clauses. At least five principles have been applied in such cases: (1) The clause may not be discussed at all if the court decides that the trustee has been guilty of gross neglect of trust duties;[28] (2) If the trustee has used reasonable care and diligence it will not be necessary to interpret the legal effect of the clause;[29] (3) A strict construction of the terms of the whole trust deed may be applied as contrasted with a claim of restriction of liability through the clause;[30] (4) If the limit of powers of the trustee is well defined by the trust instrument and general rules of law the only effect of the exculpatory clause is to limit liability for losses incurred, while acting within the defined powers, which are due to mistaken judgment or error in discretion;[31] and (5) The clause may give no more immunity than a court

[21]Rae v. Meek, 14 App. Cas. 558 (1889); Drosier v. Brerton, 15 Beav. 221, 51 Eng. Rep. 521 (Ch. 1851); *see* Carruthers v. Carruthers, (1896) A. C. 659.

[22]Rae v. Meek, *supra* note 21; Knox v. Mackinnon, 13 App Cas. 753 (1888); Pride v. Fooks, *supra* note 19; *cf.* Rehden v. Wesley, 29 Beav. 213, 54 Eng. Rep. 609 (Ch. 1861).

[23]Dix v. Burford, 19 Beav. 409, 52 Eng. Rep. 408 (Ch. 1851); Mucklow v. Fuller, [1821] Jac. 198, 37 Eng. Rep. 824; Brumridge v. Brumridge, 27 Beav. 5 (Ch. 1858).

[24]Knox v. Mackinnon, 13 App. Cas. 753 (1888); *see* Brumridge v. Brumridge, 27 Beav. 5 (Ch. 1858).

[25]Wilkins v. Hogg, 31 L. J. Ch. 41 (1861) (court wished it might disregard immunity clause, in view of facts, and force a trustee's duties on defendants, but public policy would not permit); Pass v. Dundas, 43 L. T. 665 (Ch. 1865) (saying immunity clause should protect innocent trustee from surcharge for misdealings of his co-trustee).

[26]15 Geo. V, c. 19. Section 30 provides for immunities in specifically enumerated instances. Section 62 provides that the court should be lenient when it feels that the trustee has acted in good faith, and honestly and reasonably.

[27]Carruthers v. Carruthers, [1896] A. C. 659 (construing the Act of 1861); Perrnes v. Ballamy, 1 Ch. 797 (1899) (construing Trustees' Act of 1896); Chapman v. Broune, 1 Ch. 795 (1902); Palmer v. Emerson, 1 Ch. 758 (1911).

[28]Contee v. Dawson, 2 Bland Ch. 264 (Md. 1830); Digney v. Blanchard, 226 Mass. 335, 115 N. E. 424 (1917); First Trust Co. v. Exchange Bank, 126 Neb. 856, 254 N. W. 569 (1934).

[29]North Adams National Bank v. Curtiss, 278 Mass. 471, 180 N. E. 217, 83 A. L. R. 607, 616 (1932); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930); Matter of Kramer's Estate, 172 Misc. 598, 15 N. Y. (2d) 700 (Surr. Ct. 1939); Merrell's Estate, 25 Pa. Dist. 323 (1916).

[30]*Cf.* Corbett v. Benioff, 126 Cal. App. 772, 14 P. (2d) 1028 (1932); Connover v. Guarantee Trust Co., 88 N. J. Eq. 470, 102 Atl. 844 (Ch. 1917), *aff'd*, 89 N. J. Eq. 584, 106 Atl. 890 (1918); Tuttle v. Gilmore, 36 N. J. Eq. 617, 3 Atl. 267 (1882).

[31]First Nat. Bank of Patterson v. Jersey Central Co., 115 N. J. Eq. 242, 170 Atl. 209

of equity can give.[32] The only unanimity occurs in the holding that the law, dictated by considerations of public policy, established a point beyond which the parties cannot agree to relieve a trustee from liability for breach of duty.[33]

An exculpatory clause similar in wording to that found in the instant case appears in *North Adams National Bank v. Curtiss*,[34] where the trustees were freed from liability for retention of securities in a falling market, poor diversification, and failure to invest in bonds, because the acts were done in good faith.

The courts have indulged in vague discussions of the meaning of "gross negligence," "wilful default" and "wilful,"[35] frequently construing an innocent mistake or careless, ignorant act as an intentional or wilful breach of trust.[36] Two New York cases are found where almost identical fact situations existed. In one case the court called an act "gross negligence" in order to hold the trustee liable and evade the protection of an exculpatory clause;[37] in the other where there was no such immunity clause, the court calling a like act mere "negligence" again held the trustee liable.[38]

It would seem from the cases considered that the protective force of the exculpatory clause is largely in the discretion of the court. The general rule, if one exists, would seem to be as stated in *Matter of Rushmore's Estate*, that the legal effect of the exculpatory clause is not to enlarge the powers of the trustee but rather to restrict his liabilities.[39] There are cases, however, where the trustee's powers have been clearly defined by the trust instrument, yet certain of his actions which were clear breaches of trust duty were held to be immune from liability solely on the basis of the weight accorded to an exculpatory clause.[40]

It is submitted that in light of common-law authority the court in *Matter*

(1934); Woodruff v. Freehold Trust Co., 112 N. J. Eq. 405, 164 Atl. 411 (1933); April v. April, 272 N. Y. 331, 6 N. E. (2d) 43 (1936); Crabb v. Young, 92 N. Y. 56 (1883) (leading New York case); Matter of Mallon, 43 Misc. 569, 89 N. Y. Supp. 544 (Surr. Ct. 1904), *aff'd sub nom.* Matter of Howard, 110 App. Div. 61, 97 N. Y. Supp. 23 (2d Dep't 1905), *aff'd mem.*, 185 N. Y. 539, 77 N. E. 1189 (1905); Matter of Olmstead, 30 Misc. 350, 63 N. Y. Supp. 489 (Surr. Ct. 1900), *mod.*, 52 App. Div. 515, 66 N. Y. Supp. 212 (1st Dep't 1900), *aff'd*, 164 N. Y. 571, 58 N. E. 1090 (1900); 65 C. J. § 702 (2).

[32]*In re* Jarvis' Estate, 110 Misc. 5, 180 N. Y. Supp. 324 (Surr. Ct. 1920); *see* Litchfield v. White, 7 N. Y. 438, 440 (1852).

[33]Browning v. Fidelity Trust Co., 250 Fed. 321 (C. C. A. 3d 1918), *cert. denied*, 248 U. S. 564, 39 Sup. Ct. 9 (1919); Litchfield v. White, *supra* note 32; *In re* Andrus' Will, 156 Misc. 268, 281 N. Y. Supp. 831 (Surr. Ct. 1935); 3 BOGERT, *op. cit. supra* note 4, § 542; 2 SCOTT, *op. cit. supra* note 3, § 222.3.

[34]278 Mass. 471, 180 N. E. 217, 83 A. L. R. 607, 616 (1932).

[35]Browning v. Fidelity Trust Co., *supra* note 33.

[36]Tuttle v. Gilmore, 36 N. J. Eq. 617, 3 Atl. 267 (1882); April v. April, *supra* note 31; Hart's Estate, 203 Pa. 480 (1902).

[37]*In re* Jarvis' Estate, 110 Misc. 5, 180 N. Y. Supp. 324 (Surr. Ct. 1920) (covering retention of bonds by a trustee).

[38]Matter of Garvin, 256 N. Y. 518, 177 N. E. 24 (1931) (covering retention of stocks by a trustee).

[39]Tuttle v. Gilmore, *supra* note 36; Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381 (1909); 2 SCOTT, *op. cit. supra* note 3, § 222.1.

[40]Warren v. Pazolt, *supra* note 39; Crabb v. Young, 92 N. Y. 56 (1883); *In re* Knower's Estate. 121 Misc. 208, 200 N. Y. Supp. 777 (Surr. Ct. 1923); Wilkins v. Hogg, 31 L. J. Ch. 41 (1861).

of Rushmore's Estate correctly determined the legal effect of the exculpatory clause. If the settlor had died subsequent to April 2, 1938 the clause might well have been stricken from the will under Section 125 of the New York Decedent Estate Law for being so broad in its grant of immunity as to be void as against public policy.

Donald R. Harter

Unfair Competition: Adoption of numbering system and use of comparative lists.—Plaintiffs, the largest manufacturers in the world of unbreakable watch crystals, sought to restrain, as unfair competition, the following trade practices used by defendant, their largest competitor: (1) selling of watch crystals in blue envelopes of almost identical size and shade that plaintiffs used for their crystals; (2) offering to the trade a gauge or ruler based on the same arbitrary system of measurement as that developed by plaintiffs to measure the crystals, although different in shape and carrying defendant's trade-mark; (3) placing of watch crystals in ribbed glassine envelopes after plaintiffs had made use of a similar envelope for their fancy crystals; (4) use of a numbering system based upon that of the plaintiffs and having a uniform numerical difference for each crystal of exactly two hundred from the number given to crystals of similar size manufactured by plaintiffs; (5) use of a comparative list setting forth the various numbers contained in plaintiffs' numbering system and opposite each such number the defendant's number for the same sized crystal; and (6) the practice of placing upon certain of defendant's envelopes containing watch crystals, the plaintiffs' numbers for the same sized crystals. Plaintiffs had exchanged in trade many cabinets and stocks of crystals sold to retailers by the defendant, substituting, among the former customers of the defendant, the plaintiffs' cabinets and crystals designated by the plaintiffs' size mark. *Held:* The defendant's acts do not constitute unfair competition. Injunction denied. *Germanow* et al. *v. Standard Unbreakable Watch Crystals, Inc., 283 N. Y. 1, 27 N. E. (2d) 212 (1940).*[1]

Neither Congress, state legislatures, nor the courts have established a complete and satisfactory definition of what acts constitute unfair competition. Not all practices opposed to good morals or public policy amount to unfair competition. Consequently, there are many "dirty tricks" in business which the courts do not restrain.[2] Since many objectionable trade practices can now be suppressed by the Federal Trade Commission or by prosecutions under the Sherman Act, there has been less demand to restrain them by private injunctions. These proceedings, however, have had little effect in widening the scope of unfair competition in private litigation. Courts are agreed that standardized passing off (*i.e.*, where one manufacturer attempts to sell his goods

[1]Other facts of the case: neither plaintiffs nor defendant sell to the public but only to jewelers, retailers, or jobbers, so the public is not deceived; there was no proof that there was a palming or passing off of defendant's goods as those of plaintiffs by the defendant when it sold its products.

[2]Acy v. Whaley, 281 Ky. 400, 136 S. W. (2d) 575 (1940).

to the public as those of another) can be stopped, but their attitude toward other trade practices is a matter of speculation. The word "unfair" excludes much shabby conduct and includes some honest conduct.[3] Public sentiment has swung away from the rule of *caveat emptor* and now demands honesty, but the fact that a given method of competition makes it difficult for competitors to do business successfully does not of itself brand that method of competition as unlawful and unfair. What is unfair competition, therefore, must be determined with particular reference to the character and circumstances of the business in its competitive conditions.[4]

In determining what constitutes unfair competition the court must attempt to balance the prevention of monopoly with the necessity of maintaining free competition.[5] Since jewelers are adverse to purchasing two cabinets, to prohibit the comparative lists and comparative numbers on the envelopes supplied by competitors would create or tend to create a virtual monopoly for the plaintiffs. A series of letters or numbers used solely to describe and distinguish the sizes, styles, grades, or qualities of articles in commerce, and not to describe source of origin, constitutes a "system of doing business" and not a property right, and consequently may not be preëmpted so as to create a monopoly.[6] Plaintiffs were claiming a perpetual right to the use of size numbers which was far greater than any right obtainable under laws relating to trade-marks. Material misrepresentations in the use of a trade-mark, name, or label will defeat the right of the owner to relief in equity against an infringement or imitation by others.[7] Although the defense of unclean hands in the field of unfair competition appears limited to such cases of misrepresentation, the writer suggests that its application should be extended to circumstances such as existed in this case. It appears to the writer that the plaintiffs had attempted to "squeeze" the defendant and other competitors by the "trade-ins" of the cabinets and stocks of crystals, conduct which should justify the application of the doctrine of unclean hands.

Well settled principles dispose of the remaining alleged unfair practices. One cannot have a trade-mark monopoly in the color of paper alone in

[3]Chafee, *Unfair Competition* (1940) 53 HARV. L. REV. 1289. Other recent articles in the field of unfair competition are Callman, *What is Unfair Competition?* (1940) 28 GEO. L. J. 585; Sadtler, *Unfair Competition—Past and Present Trends* (1940) 16 TENN. L. REV. 400.

[4]*See* Schechter Corp. v. United States, 295 U. S. 495, 55 Sup. Ct. 837 (1935); Federal Trade Com'n. v. Paramount Famous-Lasky Corp., 57 F. (2d) 152 (C. C. A. 2d 1932); Fisher v. Star Co., 231 N. Y. 414, 132 N. E. 133 (1921).

[5]Gillette Safety Razor Co. v. Triangle Mech Lab. Corp., 4 F. Supp. 319 (E. D. N. Y. 1933); Coca-Cola Co. v. Hy-Po Co., 1 F. Supp. 644 (E. D. N. Y. 1932); Dress Circle, Inc. v. Franklin Simon & Co., Inc., 20 N. Y. S. (2d) 225 (Sup. Ct. 1940); Sherwood v. 20th Century-Fox Film Corp., 173 Misc. 871, 18 N. Y. S. (2d) 388 (Sup. Ct. 1940).

[6]Dixie Vortex Co. v. Lily-Tulip Cup Corp., 95 F. (2d) 461 (C. C. A. 2d 1938); Speaker v. Shaler Co., 87 F. (2d) 985 (C. C. A. 7th 1937); M. J. Lewis Products Co. v. Lewis, 57 F. (2d) 886 (E. D. Pa. 1931); Dennison Mfg. Co. v. Scharf Tag, Label & Box Co., 135 Fed. 625 (C. C. A. 6th 1905); Clipper Belt Lacer Co. v. Detroit Lacer Co., 223 Mich. 399, 194 N. W. 125 (1923).

[7]Ubeda v. Zialcita, 226 U. S. 452, 33 Sup. Ct. 165 (1913); Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161 (1903); Four Roses Products Co. v. Small Grain Distilling & Drug Co., 29 F. (2d) 959 (App. D. C. 1928); Brooten v. Oregon Kelp Ore Products Co., 24 F. (2d) 498 (C. C. A. 9th 1928).

absence of a finding that it has acquired by use a secondary meaning.[8] When the form of an article or package is a functional expedient not adopted to indicate source of manufacture it is not subject to exclusive appropriation as a trade-mark in the absence of a finding it has acquired a secondary meaning.[9] A gauge or ruler graduated in fractions of an inch for measuring is a mathematical scale and if it or the measurements it makes are not used as trade-marks, then there is no exclusive right to its use and it is available to anyone.[10] No secondary meaning had been acquired by plaintiffs for the color and form of its envelopes nor had they used the gauge or its measurements as trade-marks.

The case stands then on the broad general principle that mere adoption of a competitor's business methods is not in itself unfair competition.[11]

Edward R. Moran

Wills: Incorporation by reference of an amendable trust: Effect of subsequent amendments.—The question "What is the limitation of the New York doctrine of incorporation by reference?" again arises in *President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N. Y. S. (2d) 232 (2d Dep't 1940)*. In 1933 the testator created an *inter vivos* trust, reserving the power to amend or revoke the trust by an instrument in writing to be delivered to the trustee, the Manhattan Company. During the next two years the testator made two supplemental trust indentures, changing some beneficiaries and varying the interests of others. In 1935 he executed his will. By the third article of that will he left most of his property to the Manhattan Company to be administered in accordance with the terms of the trust agreement, although its terms were not restated in the will. On the same day that the testator executed his will he made a third supplemental trust indenture which was not delivered to the trustee until after the execution of his will. The effect of this third trust amendment was to eliminate certain beneficiaries and to reduce drastically the widow's share. One month later the testator executed and delivered to the trustee a fourth trust amendment, substituting one charitable beneficiary for another. The Special Term of the Supreme Court held[1] that the will incorporated the trust together with

[8]Andrews Jergens Co. v. Bonded Products Corporation, 21 F. (2d) 419 (C. C. A. 2d 1927); Turner & Seymour Mfg. Co. v. A. & J. Mfg. Co., 20 F. (2d) 298 (C. C. A. 2d 1927); Smith-Kline & French Co. v. American Drug Syndicate, 273 Fed. 84 (C. C. A. 2d 1921).

[9]Société Anonyme de La Distillerie v. Puziello, 250 Fed. 928 (E. D. N. Y. 1918); Sun-Maid Raisin Growers v. Mosesian, 84 Cal. App. 485, 258 Pac. 630 (1927).

[10]Noll v. Rinex Laboratories Co., 25 F. Supp. 239 (N. D. Ohio 1935); Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp., 23 F. Supp. 3 (N. D. Ill. 1937); Buob *et al.* v. Brown Carriage Co., 11 Ohio App. 266 (Ct. of App., Hamilton County, 1919).

[11]Dixie Vortex Co. v. Lily-Tulip Cup Corp., 95 F. (2d) 461 (C. C. A. 2d 1938); Electric Auto-Lite Co. v. P. & D. Mfg. Co., 78 F. (2d) 700 (C. C. A. 2d 1935); Kaeser & Blair v. Merchants' Ass'n., 64 F. (2d) 575 (C. C. A. 6th 1933); William H. Keller, Inc. v. Chicago Pneumatic Tool Co., 298 Fed. 52 (C. C. A. 7th 1923).

[1]172 Misc. 290, 14 N. Y. S. (2d) 375 (Sup. Ct. 1939).

the two amendments which were made to it prior to the execution of the will and the third trust amendment which was executed on the same day as the will but not delivered to the trustee until later. The Appellate Division, one justice dissenting, reversed and held that article three of the will was invalid. The court held that to allow the incorporation of the trust as amended by the four supplemental trust indentures would be to allow the testator to alter his will by an instrument not published and attested as required by the Statute of Wills; to allow the incorporation of the trust with only three supplemental trust indentures would defeat the purpose of the testator.

In most states the doctrine of incorporation by reference is applied where there is a valid will clearly expressing the testator's intention to incorporate therein another writing existing at the time of the execution of the will, provided it can be identified by satisfactory proof.[2] A minority of states have refused to recognize the doctrine, fearing that the incorporation of unattested papers would open the door to fraud.[3]

New York formerly accepted the orthodox doctrine of incorporation by reference, at least up to 1881,[4] but it was subsequently rejected.[5] Since 1918, two decisions have qualified the limits placed upon the doctrine in New York.

In *Matter of Fowles*[6] the testator and his wife executed wills on the same day before sailing on the *Lusitania*. The testator gave his wife a power of appointment which she exercised in her will. His will also provided that he should be deemed to have survived his wife in the event of a common disaster.[7] The court held that a testator could incorporate into his own will the provisions of the will of another, whether that other will antedated or was subsequent to the testator's will. In writing the majority opinion, Judge Cardozo declared that the application of the rule against incorporation was not to be carried to "a drily logical extreme."[8]

Fourteen years later, in *Matter of Rausch*,[9] the testator created an *inter vivos* trust for the benefit of his feeble-minded daughter. By his will he left a fifth of his residuary estate to the trustee of the *inter vivos* trust, stipulating

[2]The leading cases probably are Allen v. Murdock, 11 Moore P. C. C. 427 (1858), and Newton v. Seaman's Friend Society, 130 Mass. 91, 39 Am. Rep. 433 (1881). There are numerous other cases: Keeler v. Merchant's Loan & Trust Co., 253 Ill. 528, 97 N. E. 1061 (1912); *Ex parte* Hull, 164 Md. 39, 163 Atl. 819 (1933); *In re* McClure's Estate, 309 Pa. 370, 165 Atl. 24 (1933). See ATKINSON, WILLS (1937) § 143.

[3]Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907); Murray v. Lewis, 94 N. J. Eq. 681, 121 Atl. 525 (1923).

[4]Caulfield v. Sullivan, 85 N. Y. 153 (1881); Brown v. Clark, 77 N. Y. 369 (1879); Tonnele v. Hall, 4 N. Y. 140 (1850).

[5]Booth v. Baptist Church, 126 N. Y. 215, 247, 28 N. E. 238 (1891). For a detailed study of the New York decisions see REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1935) 431-438.

[6]222 N. Y. 222, 118 N. E. 611 (1918), noted (1918) 3 CORNELL L. Q. 320, (1918) 31 HARV. L. REV. 1170, (1918) 27 YALE L. J. 673.

[7]As to the validity of the survivorship provisions see (1940) 25 CORNELL L. Q. 317.

[8]Matter of Fowles, *supra* note 6, at 233.

[9]258 N. Y. 327, 179 N. E. 755, 80 A. L. R. 98, 103 (1932). The case was noted in (1932) 6 CINC. L. REV. 295, (1932) 32 COL. L. REV. 917, (1933) 17 MINN. L. REV. 564, (1932) 9 N. Y. U. L. Q. REV. 507.

that it was to be held on the same terms as those embodied in the trust deed, without restating its terms. This time on behalf of a unanimous court, Judge Cardozo held "the legacy when given was not the declaration of a trust, but the enlargement of the subject-matter of a trust declared already."[10] The reason for his conclusion was "the mind rebels against the formalism that would invalidate a bequest for no better reason than the omission to state the purpose of the trust again."[11] An existing trust was regarded as a legal fact of independent significance.

These two decisions were generally believed to have relaxed the New York rule against incorporation by reference, at least to the extent of allowing the incorporation of wills, trust indentures and other formal documents, where there is admittedly little chance of fraud.[12]

In the principal case, the court attempted to distinguish the *Rausch* case by assuming that the *Rausch* case was a whimsical exception to the inflexible New York rule against incorporation by reference. In the principal case the trust was amendable and revocable; the court stressed the fact that in the *Rausch* case the trust was unamendable and irrevocable. It is a matter of controversy whether Judge Cardozo could have intended that any qualification of the rule should be based on that distinction since it cannot be ascertained from his opinion in the *Rausch* case whether that trust was unamendable and irrevocable or not.

Although there is not a great deal of authority on the point, New Jersey has upheld a reference to a revocable trust;[13] California has allowed the incorporation of an amendable and revocable trust where there were no attempted amendments.[14] An Ohio case, *Koeninger v. Toledo Trust Co.*,[15] was the first to allow the incorporation of the original terms of an amendable trust deed although it was amended subsequent to the execution of the will. The Ohio court advanced the novel theory that the incorporation of the trust agreement in the settlor's will constituted a waiver of his right to amend except by an instrument complying with the Statute of Wills. Within a year, on the same facts, the Massachusetts court reached the same result in *Old Colony Trust Co. v. Cleveland*[16] on the theory that the testator would prefer

[10] 258 N. Y. 327, 331, 179 N. E. 755 (1932).

[11] *Ibid.*

[12] See ATKINSON, WILLS (1937) § 143, n. 37; note (1938) 23 CORNELL L. Q. 479, 482. Surrogates Slater and Howell apparently labored under the same belief: Matter of Bremer, 156 Misc. 160, 281 N. Y. Supp. 264 (1935); and Matter of Tiffany, 157 Misc. 863, 285 N. Y. Supp. 971 (1935).

[13] Swetland v. Swetland, 102 N. J. Eq. 294, 140 Atl. 279 (1928). The decision was not rendered on the basis of the doctrine of incorporation by reference. The New Jersey court reasoned that the testator merely added property to a trust fund established by him years before the execution of his will.

[14] Estate of Wiley, 128 Cal. 1, 60 Pac. 471 (1900). *Contra*: Atwood v. Rhode Island Hospital, 275 Fed. 513 (C. C. A. 1st 1921), *cert. denied*, 257 U. S. 661 (1922). The *Atwood* case has been vigorously criticized: (1922) 35 HARV. L. REV. 625. See Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521. See also RESTATEMENT, TRUSTS, § 54.

[15] 49 Ohio App. 490, 197 N. E. 419 (1934), noted (1936) 21 CORNELL L. Q. 492, (1935) 9 CINC. L. REV. 279, (1936) 49 HARV. L. REV. 498, (1935) 2 OHIO ST. L. J. 72.

[16] 291 Mass. 380, 196 N. E. 920 (1935). Professor Bogert approves of the *Koeninger*

to have his property pass under the trust deed as it stood at the date of the will, rather than have it pass by intestacy.

Professor Scott[17] takes the position that the courts should permit the testator to add by will to his *inter vivos* trust, where the trust is amendable and has been amended subsequent to the execution of the will, because there is no reason why the property should not pass in accordance with the terms of the trust as amended at the date of the testator's death.

The result reached in the principal case seems undesirable. There is little danger of fraud or mistake in this type of situation. In the *Rausch* case the possibility of incorporating an oral trust was expressly ruled out.[18] The decision in the principal case involves a total disregard of the carefully drawn trust which the testator has designated as the medium through which his property shall be distributed and substitutes therefor a formal distribution under the laws of intestacy.

The theory of the *Koeninger* case, although it involves a partial disregard of the testator's wishes in that the trust amendments subsequent to the execution of the will are ignored, furnishes a workable rule. The position advocated by Professor Scott is perhaps equally sound and can be justified in New York on the basis of the *Fowles* and *Rausch* cases.

Ralph H. German

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and *Old Colony Trust* cases, and concludes: "If a living trust has been created and the settlor thereafter executes a will leaving property to the trustees of the living trust, and the living trust is thereafter amended as to beneficiaries, and later the will takes effect, the property passing by will goes to the trustees of the living trust for the beneficiaries as they existed at the time of the execution of the will." 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 106.

[17]"If the testamentary trust can be upheld upon the ground that the terms of the testamentary trust are determined by facts of independent significance, and the *inter vivos* trust as it exists from time to time is such a fact, there would seem to be no objection to permitting the property passing by the will to be added to the *inter vivos* trust in accordance with the terms of the trust as they are at the death of the testator, even though they were modified after the excution of the will." 2 SCOTT, TRUSTS (1939) § 299.

[18]258 N. Y. 327, 331, 179 N. E. 755 (1932).